LAW AS PLURALISM:
THE ADEQUACY OF LEGISLATION TO CONFLICTING FUNDAMENTAL COMMITMENTS

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"*Mutual understanding in the strong sense […] is not required for the undertaking of joint projects.*"
– Robert Brandom[1]

"*Politics involves the clash that emerges when appraisive concepts are shared widely but imperfectly, when mutual understanding and interpretation is possible but in a partial and limited way […].*"
– William Connolly[2]

"*We can live together without agreeing on what the values are that make it good to live together; we can agree about what to do in most cases, without agreeing about why it is right.*"
– Kwame Anthony Appiah[3]

[1] "[M]utual understanding in the strong sense Habermas is insisting upon is *not* required for the undertaking of joint projects." Brandom 2000, 363.
[2] "Politics involves the clash that emerges when appraisive concepts are shared widely but imperfectly, when mutual understanding and interpretation is possible but in a partial and limited way, when reasoned argument and coercive pressure commingle precariously in the endless process of defining and resolving issues." Connolly 1993, 40.
[3] "Appiah 2006, 71.

Contents

1 Introduction[4]

1.1 An outsider's view of our world's legislation

A fledgling diplomat from Pluto, posted on her first mission to Earth, would no doubt be surprised by the way in which legislation on this planet is negotiated and adopted. On civilized planets like Pluto, a global legislature passes all the laws that Plutonians can more or less all agree on, regardless of their varying beliefs, values and other **fundamental commitments**. The stuff that gets left over is negotiated and adopted by subsets of the Plutonian population who live together, work together, or otherwise interact with each other on a regular basis and have to figure out how to get along and undertake joint projects, even though their beliefs, values and other fundamental commitments also differ from each other's – albeit usually not by quite as much as in the Plutonian population as a whole. Within these subsets of the population, even smaller and less diverse sub-subsets pass even more particularistic laws that they more or less all agree on – laws that may differ considerably from the laws adopted by other subsets and sub-subsets. This recursive process trickles down to the tiniest groups of the Plutonian population, say individual neighborhoods or businesses or religious communities or families, and the aspects of Plutonian existence that are not governed by any of these groups, great or small, are left to the individual Plutonian citizens to decide for themselves. Plutonians call this legislative practice "**law as pluralism**."

On Earth, the origin of laws is very different. At the global level, almost nothing is legislated directly. Instead, roughly 200 entities called "states" act like little worlds of their own, passing laws as they see fit. These laws don't necessarily have to meet with the support of their respective state's population – in some states, the laws correspond rather well to the beliefs, values and other fundamental commitments of the particular subset of Earthlings they govern; in other states, they don't. How laws are generated in these states is more often than not determined by sets of procedural rules and substantive constraints called "constitutions," which usually consist of a single, relatively short document, and volumes and volumes of commentaries and interpretations by institutions such as legislatures and courts created by those same constitutions, along with even more commentaries and interpretations by law professors and other proclaimed or self-proclaimed experts. The origin of these constitutions is frequently uncertain and rooted in

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the state's mythological past,[5] although they often are said to have been legitimized by the explicit or at least tacit consent of some of the local population who were alive and deemed worthy of voting at the time the constitution was adopted. In some states, constitutions are followed more or less religiously, with all that religious fervor entails; in others, the constitutions are hardly worth the paper they are written on, but are used as a foil for calling rivals' political proposals and personal conduct "unconstitutional."[6]

Constitutions of states may proclaim that "the buck stops here" in the legislative process, i.e., that all laws of any importance are to be passed at the level of the state, while other constitutions provide that some laws of generally secondary or tertiary importance can be negotiated and adopted at the level of political subdivisions or local authorities. What is intriguing about these "states" and their political subdivisions and local authorities is that, even though they are called upon to determine the laws that bind their respective populations, their territories came about through historically contingent facts and events, such as mountain ranges, rivers, dialects, slight physical differences of their populations, aristocratic whims, military conflicts, and peace treaties. At the dawn of the third millennium, which is when our Plutonian diplomat arrives on Earth, the jurisdictions of these entities do not often coincide with populations that are homogeneous in terms of beliefs, values and other fundamental commitments. At one point, long ago, perhaps they did at least in theory or by fiat, but nowadays, the increasing fragmentation of religions, philosophies, ethics and other systems of fundamental commitments have heterogenized populations to the extent that territorial boundaries often bear only a vague and increasingly blurry relation to boundaries between worldviews.[7] This process has been aggravated by mobility and migration – as humans hop around from one territory to another, working and settling temporarily or permanently in places other than where they were born, for economic, social, cultural, political, climatic or familial reasons, they bring their fundamental commitments with them and further jumble up the populations of legislative jurisdictions which, due to

[5] Even the proceedings of the state ratification conventions of the paradigmatic modern constitution, the U.S. Constitution of 1787/89, are largely shrouded in mystery. See Rakove 1996, 17. Many of the origins of the largely unwritten British "constitution," including the Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689), along with numerous Acts of Parliament, and "constitutional conventions," are even more mythological. See generally Waluchow 2008.

[6] This is especially true where mechanisms for enforcing constitutionally enumerated rights are lacking. See, e.g., the *Constitution of the Union of Soviet Socialist Republics of 1977*, especially Chapter 7, as a notorious example. But certain provisions of otherwise judicially enforceable constitutions may also qualify, such as arguably the Tenth Amendment of the U.S. Constitution. See *United States v. Darby*: "[The Tenth Amendment] states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." But cf. *New York v. United States*, *Printz v. United States*, and *Virginia v. Sebelius*.

[7] This discrepancy between national boundaries and homogenous populations is particularly striking in the case of the colonial and post-colonial drawing of boundaries, especially in Sub-Saharan Africa, South Asia, and the Middle East.

their historical contingencies, are still expected by their populations and the rest of the world to be governed by a coherent body of law.[8]

The way in which laws are negotiated and adopted at the levels above that of the state is even more astonishing to our outside observer: no constitution lays down the rules by which these laws are negotiated, and instead an amalgam of "charters," "treaties," "statutes," "*jus cogens* norms," "obligations *erga omnes*" and other ominous sounding constructs create ad hoc institutions, forums, and diplomatic conferences where generally unelected representatives of states get together to agree on laws that govern the interactions among their states and, more rarely, among the citizens of different states and between states and their citizens.[9] Most of these laws only become binding when they are approved back home by the legislatures and courts of the respective states, which may throw unexpected wrenches into the process or interpret the original intent of the global negotiators to death or at least to endless uncertainty and litigation.

As a first assignment, our Plutonian diplomat has been asked by her[10] foreign office to write a dissertation-length memorandum or paper with the goal of subtly interfering in the internal affairs of Earthlings by nudging them in the direction of Plutonian civilization's conception of law as pluralism. In order to do this, she must attempt to understand what it is human legislators do and what they *can* do when negotiating and adopting legislation.

1.2 Normative goal

Under utopian circumstances, the normative goal of the paper would be pursued by defining rules for the negotiation and adoption of laws so that the laws would be adequate to the potentially conflicting fundamental commitments of *the members of the entire world's population*. But barring world war or revolution, which are beyond the scope of this paper, the establishment of a global legislature with the competence to pass binding and enforceable global laws is not in the offing – and even less so a global constitution that would set out the parameters for the negotiation,

[8] For instance, approximately 12.5% of the current U.S. population was born in a foreign country; this is true of even 20.4% of the population of New York State and 26.2% of the population of California. See United States Census Bureau 2010.

[9] At the global level, the body of law with direct effect on individuals is fairly small, but growing. Several resolutions of the United Nations Security Council entail direct obligations on individuals, most notably the sanctions regimes such as those established under *United Nations Security Council Resolution 1267 (1999)*. The *Rome Statute of the International Criminal Court*, the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, the *Statute of the International Criminal Tribunal for Rwanda* and other statutes of ad hoc tribunals likewise bind individuals directly. Chapter VII of the *Charter of the United Nations* and the respective statutes provide direct enforcement mechanisms in case of breach. Otherwise, global treaties with effect on individuals are generally only indirectly binding and enforceable, via the respective states parties. See, e.g., Articles III-VI of the *Convention on the Prevention and Punishment of the Crime of Genocide*. For a theoretical consideration of the increasingly direct effect of international law on individuals, see Franck 1999, especially 196-254, and Broomhall 2003, especially 7-62.

[10] Or his: Plutonians are gender-neutral, as are the other generic persons referred to in this paper.

interpretation, and conditions of validity of global legislation. Hence, a less ambitious formulation of this paper's goal is the following:

> to define rules for the negotiation and adoption of laws so that, in each legislative jurisdiction, the laws are adequate to the potentially conflicting fundamental commitments of the members of the population in that legislative jurisdiction.[11]

The utopian goal can be seen as the asymptotic case of this less ambitious goal: if mechanisms can be found to ensure that legislation is adequate to the fundamental commitments of a given population, those mechanisms could in theory be extended to cover the world's population. Conversely, the less ambitious goal can be seen as a manageable subset of the utopian goal, ranging over the population of a specific, historically contingent state or political subdivision thereof, rather than over the population of the entire planet.

As this paper strives to achieve its less ambitious goal, the utopian goal should nevertheless always be kept in mind as the asymptotic case. International legal theory deals with something resembling the utopian goal, but given the practical constraints within which international law operates, and as the etymology of "inter*national*" indicates, it generally restricts itself to considerations that presuppose the existence of sovereign states and the limited availability and effectiveness of supranational institutions.[12] In this sense, the utopian aspect of this paper is an exercise in international legal theory, without the constraint of having to deal with pre-existing, historically

[11] At the heart of this goal is the problem of pluralism as applied to legal philosophy where only a thin basis for consensus exists, if at all. For similarly motivated attempts, see generally Rosenfeld 1998 (developing a substantive normative conception of "comprehensive pluralism," which distinguishes between first-order and second-order norms, to bridge the gap between self and other), Rosenfeld 2010 (distinguishing between singular, plural, and universal constitutional subjects in order to construct a pluralistic conception of constitutional identity), Connolly 2005 (developing a substantive normative conception of "deep pluralism," based on a "bicameral structure of commitments" that allows tolerance of ambiguities in politics and law), Kekes 1993 (expressing skepticism that agreement on overriding substantive *or* procedural values can or should be found, advocating instead for facilitation of the widest possible plurality of values, both substantive and procedural), Rescher 1993 (a critique of neo-contractarian theory espoused by the likes of Jürgen Habermas and John Rawls, arguing instead for an incremental, pragmatic approach to law that eschews consensus), Kymlicka 1995 (arguing for the compatibility of collective rights for minorities and liberal theory), Kymlicka 2007 (expanding this analysis, with a greater focus on international law and relations), Shachar 2001 (developing a "joint governance" approach to protect minorities while protecting the rights of individuals within minorities), and Swaine 2005 (arguing for an expanded conception of liberalism to allow for the partial autonomy of theocratic communities). This attempt differs from e.g. Habermas 1996, who argues that the structure of language and justification itself provides a consensual basis for negotiating and adopting universally binding norms, and Rawls 2005, who argues that an overlapping consensus of comprehensive worldviews provides a sufficient basis for agreement on (at least) matters of constitutional essentials and basic justice. Like many liberal theorists, Habermas and Rawls presuppose or argue for a thicker basis of consensus than presupposed or argued for by the aforementioned writers or in this paper. On this basic distinction between thin and thick conceptions of agreement, see Walzer 1994.

[12] The existence of the European Union and its state-like institutions and legislation blurs the distinction between national and international somewhat; for the purposes of this paper, the European Union should be treated like a state when it acts like a state, and it should be treated like an international institution when it acts like an international institution.

contingent international institutions and mechanisms. What remains historically contingent even in this paper's consideration of the utopian goal is the plurality of actually existing, conflicting beliefs, values, and other fundamental commitments among the world's population. This paper is not an exercise in interplanetary, interspecies or universal legal theory, but rather an exercise in legal theory applicable to the human beings who actually inhabit this particular planet at the dawn of the third millennium. The theoretical bent of the utopian goal is thus mitigated by the practical contingency of the population to which it aspires to apply.

Constitutional theory deals with something resembling the less ambitious goal, but often applies to a given, historically contingent constitutional system, perhaps with the aspiration of tweaking that system to bring it in line with theoretical considerations of what that given constitutional system should look like. Comparative constitutional theory looks at the less ambitious goal as applied to a more-or-less wide range of historically contingent constitutional systems, with the objective of understanding their similarities, differences, and underlying principles, and perhaps with the aspiration of bringing their similarities, differences, and principles in line with theoretical considerations of what any constitutional system should look like. In this sense, the less ambitious goal of this paper is an exercise in comparative constitutional theory. However, this paper's goal takes a broader view, in that it looks down upon constitutional systems from a global perch: given the aspirations of the utopian goal, how can actually existing constitutional systems be brought in line with the theoretical considerations of what mechanisms under the utopian goal would look like?

This paper thus touches on issues raised by both international and constitutional theory, but it is not about the "internationalization of constitutional law"[13] or the "constitutionalization of international law."[14] Instead, it seeks to develop a way of thinking about the negotiation and adoption of legislation, given the plurality of conflicting beliefs, values, and other fundamental commitments prevalent within a given population, regardless of whether that population covers the territory of a state, a political subdivision, or the entire planet. It is thus an exercise at the interface of legal philosophy and political philosophy: it examines the ways in which human beings get together to negotiate and adopt laws that bind them, and it suggests ways to do this better, given the plurality of fundamental commitments.[15] While primarily a theoretical exercise, it provides tools that can be used for a practical critique of existing mechanisms for the negotiation and adoption of legislation under conditions of conflicting fundamental commitments.

[13] See generally Schwartz 2003.
[14] See generally Klabbers, Peters and Ulfstein 2009.
[15] On this normative connection between legal philosophy and political philosophy in general, but with a more historicist emphasis, see Waldron 2002.

1.3 Key terminology

1.3.1 Legislation, legislatures, and lawmaking

This paper focuses on *legislation*, so a few remarks are in order about what is meant by that term and related terms. Given that the utopian goal of this paper is simply the asymptotic case of the less ambitious goal, terms such as "legislature," "legislator," "legislation," "constitution" and so on should not be read as limited to the case of states and political subdivisions thereof as we are accustomed to, i.e., they should not be read as limited to the less ambitious goal, but should be extended to include a (theoretical) "legislature," "legislator," "legislation," "constitution" and so on at the global level, i.e., for purposes of the utopian goal.

The term "legislation" itself is ambiguous: on the one hand, it may refer to the product of the legislative process, namely a statute or a law. But it may also refer to the legislative process itself, namely the negotiation and adoption of legislation.[16] In this paper, "legislation" will always refer to the product, and "legislative process" or simply "legislating" or "lawmaking" will always refer to the process of negotiating and adopting legislation. As defined here, "legislation" always refers to enactments that are *binding* on a population or a subset of a population and are *enforceable* with respect to that population or subset; mere recommendatory pronouncements are not considered "legislation." Legislation is negotiated and adopted by *legislatures*; for the purposes of this paper, "legislature" means any body capable of negotiating and adopting legislation that *binds* a population or a subset of a population in a given *legislative jurisdiction*. This includes classical legislatures such as parliaments, but also quasi-legislative bodies of supranational and international institutions, as long as they have the legal competence to *bind* members of a population, as well as other public *or* private bodies with the legal competence to bind. "A law" or "laws" will refer to any provisions adopted by a legislature as defined above, regardless of the rank of those provisions in the legal system (e.g., "merely" statutory, constitutional, or the like). A binding resolution by a supranational or private body with the legal competence to bind members of a population will thus also be referred to as "a law." "A law" may refer to an individual statute or the like, provisions thereof, or several statutes or the like with the same subject matter.

In this context, it should be noted that the terms "negotiation" and "negotiate" are not meant to prejudice what precisely legislators do when they submit, discuss, argue for and against, reach compromises on, or horse-trade in relation to legislative proposals and the like, i.e., when they engage in the practice of giving and asking for reasons as part of the legislative process. The terms do not imply anything about what is going on in legislators' minds when they engage in the legislative process, what attitudes they adopt toward the legislative process and conflicting proposals, and so on. Specifically,

[16] This is analogous to the ing/ed ambiguity explicated by Wilfrid Sellars. See, e.g., Sellars 1969, 65: "[The term 'thought'] is also ambiguous, sometimes referring to *what* is thought, sometimes to the *thinking* of it." Analogously, the term "legislation" sometimes refers to *what* is legislated, sometimes to the *legislating* of it. The parallels between legislation and thought (or more precisely *language* as the discursive expression of thought) will be a key focus of this paper.

nothing is implied by the choice of "negotiation" as opposed to, say, "deliberation."[17] For the purposes of this paper, "negotiation" and "negotiate" simply mean what goes on when legislators consider and talk about legislative proposals, with a view to adopting legislation.

1.3.2 Fundamental commitments

Two terms do most of the theoretical work in the formulation of this paper's goals, as well as in the title of this paper: "fundamental commitments" and "adequate." Defining these two terms and their relationship with each other constitutes the bulk of this paper; to get started, the following rough definitions shall suffice:

"**Fundamental commitments**" are the bedrock, non-negotiable beliefs, values, convictions, revelations, intuitions, and so on, that a given person or group of persons holds in relation to the way the world is and the way it ought to be. They are where one's "spade is turned,"[18] or one's matters of "ultimate concern,"[19] the pillars of one's (or one's group's) personal sense of meaning and destiny (or lack thereof) – pillars that one is not willing to dismantle, renovate or exchange without a desperate or even violent fight. Fundamental commitments are often linked together within a more-or-less coherent system of commitments called a worldview,[20] "comprehensive doctrine,"[21] or the like,

[17] For an overview and analysis of the theoretical distinctions between negotiation and deliberation, see Mansbridge 2009. Cf. also Gaus 2003, 148: "The metaphor of 'negotiation' is appropriate when interests or mere preferences are at stake; but not in discussions at getting things right or to the truth." Although more is at stake in law as pluralism than interests or mere preferences (namely, fundamental commitments), law as pluralism does not aim at "getting to the truth"; this will be discussed in more detail in subsection 2.2.2 on "Achievability, truth, and validity." Law as pluralism does, however, aim at "getting things right," in the sense of finding a way to generate laws that are adequate and enforceable, given conflicting fundamental commitments held by a population. So although this only imperfectly meets Gaus's criteria for the term "negotiation," "negotiation" is still used in part because it is less of a theoretically occupied term than, say, "deliberation."

[18] See Wittgenstein 2008, 85: "If I have exhausted the justifications, I have reached bedrock and my spade is turned." Cf. also Putnam 1987, 85: "Recognizing that there are certain places where one's spade is turned; recognizing, with Wittgenstein, that there are places where our explanations run out, isn't saying that any particular place is *permanently* fated to be one of these places, or that any particular belief is forever immune from criticism. This is where my spade is turned *now*. This is where my justifications and explanations stop *now*."

[19] See Tillich 1957, 1: "[M]an, in contrast to other living beings, has spiritual concerns – cognitive, aesthetic, social, political. Some of them are urgent, often extremely urgent, and each of them… can claim ultimacy for a human life or the life of a social group. If it claims ultimacy it demands the total surrender of him who accepts this claim, and it promises total fulfillment even if all other claims have to be subject to it or rejected in its name."

[20] See Ishii, Klopf, and Cooke 2006, 32, citing Samovar, Porter, and Stefani 1998: "Worldview is culture's orientation toward God, humanity, nature, questions of existence, the universe and cosmos, life, death, sickness, and other philosophical issues that influence how its members see the world."

[21] See e.g. Rawls 2005, 13: "A moral conception is general if it applies to a wide range of subjects, and in the limit to all subjects universally. It is comprehensive when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole. A conception is fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system; whereas a conception is only partially comprehensive when it comprises a number of, but by no means all, nonpolitical values and virtues and is rather loosely

which may be of a religious, secular, philosophical, ethical, moral, or similar nature. Fundamental commitments, and the worldviews of which they may be part, may conflict with the fundamental commitments and worldviews of others; two fundamental commitments conflict when one cannot be true or valid if the other is true or valid.[22]

Fundamental commitments are a type of *doxastic commitment*.[23] A doxastic commitment, in contrast to a *practical* commitment,[24] is an "epistemic claim" as opposed to a "practical project";[25] it expresses a belief or judgment as opposed to an intention to do something.[26] Doxastic commitments are articulated inferentially, i.e., they are *assertible* and they play an inferential role in the discursive social practice of "giving and asking for reasons."[27] In theoretical (discursive) reasoning, doxastic commitments in general play the role of both premises and conclusions; in practical reasoning, they play the role only of premises.[28] What marks *fundamental* commitments as a special type of doxastic commitment is that they serve only as premises even in *theoretical, discursive* reasoning: a fundamental commitment may serve as a reason for other doxastic commitments, but (from the perspective of the person who holds the fundamental commitment) it does not stand in need of reasons itself. From the standpoint of the person who holds the commitment, it simply is *true* or *valid*.

Why bother speaking of fundamental commitments, let alone doxastic commitments, when it would be easier to speak simply of "fundamental beliefs," "values," and so on? As Robert Brandom remarks,

> 'Assertion', 'claim', 'judgment', and 'belief' are all systematically ambiguous expressions – and not merely by coincidence. The sort of pragmatism adopted here seeks to explain what is assert*ed* by appeal to features of assert*ings*, what is claim*ed* in terms of claim*ings*, what is judg*ed* by judg*ings*, and what is believ*ed* by the role of believ*ings* (indeed, what is expressed by expressings of it) – in general, the content by the act, rather than the other way around.[29]

Regardless of what one thinks of this pragmatist approach as applied to philosophy of language or epistemology, this focus on the *act* of believing, valuing, and asserting – as opposed to *what* is believed, valued, asserted – fits naturally with the problem of legislating under conditions of pluralism. The problem of pluralism is about *how* to engage in the process of justifying disparate commitments and bringing them together as part of a legislative project; it is not primarily about *what* the contents of those disparate

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articulated. Many religious and philosophical doctrines aspire to be both general and comprehensive."

[22] The notions of *truth* and *validity* will be discussed in more detail in subsection 2.2.2 below. See generally Finlayson 2005, Habermas 2004.

[23] See Brandom 1994, 157-159.

[24] See Brandom 1994, 238-243.

[25] Habermas 2000, 349.

[26] See Brandom 2000b, 370-371.

[27] Sellars 1956/1997. See also Brandom 1994, 142: "Their inferential articulation, in virtue of which they deserve to be understood as propositionally contentful, consists in consequential relations among the particular doxastic commitments and entitlements – the ways in which one claim can commit or entitle one to others (for which it accordingly can serve as a reason)."

[28] See Brandom 2000b, 366.

[29] Brandom 2000a, 4.

commitments are.[30] Within the legislative process, beliefs and values are asserted as justifications for legislative proposals; laws emerge from the legislative process through the discursive legislative practice of "giving and asking for reasons." Of course, the nature of law lies in its *content*: laws without content are empty.[31] The pragmatist[32] approach pursued here does not deny the central importance of legal content as opposed to process; it aims simply to show how the content of *legislation* is and can be derived from the process of *legislating*, which is *primary*, especially under conditions of conflicting fundamental commitments.[33]

1.3.3 Adequacy

What does it now mean for legislation to be "**adequate**" to the plurality of conflicting fundamental commitments? Legislation is *adequate* to the plurality of the fundamental commitments of the population bound by that legislation if the negotiation of the legislation takes account of *all* the fundamental commitments identifiable within the population, to the extent achievable, and if the legislation actually adopted reflects (i.e., is compatible with and derivable from) *all* the identifiable fundamental commitments that can be

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[30] This separation of the *how* from the *what* is at best blurry, and has been viciously critiqued in legal theory. See, e.g., Tribe 1980. But as a regulative *ideal*, a focus on process over substance is conducive to solving the problem of pluralism, in which the content of conflicting commitments is treated equally *prima facie*. See Habermas 1996, especially xl, 388-446 and 463-490; Ely 1980, especially 73-104.

[31] Cf. Kant 1787, B75: "Thoughts without content are empty."

[32] While the author is sympathetic to recent attempts to apply "classical" pragmatism, especially as expounded by John Dewey, C. S. Peirce, William James and (specifically in the domain of legal theory) Oliver Wendell Holmes to political philosophy, the pragmatist approach pursued here is more akin to the "analytic pragmatism" developed by Robert Brandom. See, e.g., Brandom 2008, xii: "It is pragmatism pursued in an analytic spirit. By calling it 'pragmatism' I mean a view inspired by insights of the later Wittgenstein, which situates concern with the *meaning* of expressions in the broader context of concern with proprieties governing their *use*. It counsels us to start our thinking about the meanings expressed by various vocabularies to express those meanings. Pursuing those pragmatist ideas in an analytic spirit is rejecting the anti-theoretical, anti-systematic conclusions that are often drawn from them." For examples of the application of classical pragmatism to political philosophy, see generally Festenstein 1997 (providing a general overview of the topic, with an emphasis on the impact of John Dewey), Talisse 2005 (applying C. S. Peirce's conception of pragmatism to deliberative democracy), Tan 2004 (applying Dewey's pragmatism and Confucianism to democratic theory), Ferguson 2007 (emphasizing James's contributions to pluralism), Rorty 1989, Rorty 1998 and Rorty 2000 (drawing on Dewey to develop an "ethnocentric" conception of liberal democracy, while claiming to deny foundationalism of any sort), and Haack 2008 (applying Peirce and Holmes to legal theory). Cf. also Habermas 1996 (amalgamating C. S. Peirce's pragmatism with his own foundationalist theory of discourse, which draws on John Searle and J. L. Austin, to arrive at a theory of deliberative democracy and law) and Coleman 2001 (drawing on Wilfrid Sellars, W. V. O. Quine, Donald Davidson and Hilary Putnam to illuminate his inclusive brand of legal positivism).

[33] This conceptual separation of the process of legislating (which determines *what the law is*) from the content of legislation (which makes it possible to judge *what the law ought to be*) makes law as pluralism a comfortable bedfellow of (exclusive) legal positivism and its central "separation thesis" or "separability thesis" as developed by, e.g., Hart 1994, Raz 1994 and Marmor 1997. For an overview of exclusive legal positivism, see Marmor 2002. But law as pluralism (and hence this paper) is not so interested in the analytical or conceptual question of *what the law is*, but rather in the normative question of *what lawmaking ought to be* under conditions of conflicting fundamental commitments. On normative vs. analytical approaches to legal philosophy, see West 2009 vs. Bix 2009.

reconciled with each other in the legislative jurisdiction in which the legislation is adopted. The bulk of this paper will examine what this reconciliation means in practice, and it will flesh out the idea of the legislative jurisdictions in which legislation is negotiated and adopted. Another way of looking at this is that the process of negotiating legislation for a given population must take *all* fundamental commitments held by members of that population as equal *input* to the process, to the extent achievable, and the *output* of the process must reflect that input, to the extent achievable, given the extent of the plurality of commitments within that population. In a population with homogeneous commitments, one would expect pretty much any legislation passing through such a process to be adequate to those commitments; the challenge of this paper is to examine how to negotiate and adopt adequate legislation where the commitments of a population are not homogeneous, and where such commitments conflict with each other.

Put in terms of justification and the discursive legislative practice of giving and asking for reasons, a law is adequate to the conflicting fundamental commitments of a population if, to the extent achievable, all fundamental commitments are admitted to the legislative process as potential justifications for proposed laws, and if, to the extent achievable, the actual law adopted is justifiable in terms of all the fundamental commitments that have been admitted as potential justifications to the legislative process. There are thus two components to adequacy: a condition on the fundamental commitments admissible as potential justifications, and conditions on the use of those admitted fundamental commitments as justifications for laws actually adopted.

The phrase "to the extent achievable" indicates that all fundamental commitments are treated equally *prima facie*, but that actually adopted laws may not end up being justifiable in terms of all fundamental commitments: there are theoretical and practical limits on the extent to which all fundamental commitments can be taken into account during the negotiation and adoption of legislation. Much of this paper will explicate what these limits are and how they should affect the admission and consideration of fundamental commitments.

Adequacy, as thus defined, is a technical concept that says nothing directly about *authority* or *legitimacy*, and this paper does not make a claim that the output of the legislative process it proposes is authoritative or legitimate in any theoretically substantial sense.[34] Adequacy provides a tool for critiquing legislation and the legislative process that is distinct from the tools of authority and legitimacy: it is a *measure of the pluralism of legislation*, not of the acceptability, reasonableness, or "goodness" of legislation from the perspective of any comprehensive or political conceptions other than the conception of pluralism developed here.

[34] In this sense, the project of this paper is orthogonal to the projects pursued by Raz 2009 and Habermas 1996, which deal primarily with authority and legitimacy. While adequacy may in practice often be linked to authority or legitimacy, these concepts can in principle be analyzed independently of each other: legislation may be adequate to the fundamental commitments of a population without being authoritative or legitimate, and vice-versa.

As a practical matter, however, the author does expect that legislation deemed adequate by a population would in many cases also be deemed legitimate by that population, perhaps with the proviso that the legislation must be efficacious in the sense of being capable of bringing about the intended purpose of the legislation. And even if a given piece of legislation is not deemed legitimate, one might still reasonably expect the process by which legislation is generated to be deemed legitimate as a whole, provided that the legislation outputted by that process is adequate.[35]

1.4 Ground rules

In order to go about pursuing the goals of this paper, some ground rules must be established first – ground rules in the sense of basic presuppositions that this paper largely takes for granted, without engaging in further argument to support them.

1.4.1 Negotiation and adoption by legislators

The first ground rule is that this paper is limited to the negotiation and adoption of *legislation* by *legislators*. Although it touches on consideration of *public* justification, *public* deliberation, and so on,[36] it is primarily concerned with what legislators do when they legislate, not with what citizens do when they argue, deliberate, advocate, or even participate in public votes. This also means that while the paper takes a sideways glance at what it is courts do when interpreting legislation,[37] it is primarily concerned with what the input to interpretation is that is generated by legislators, not with interpretation itself. As the products of this paper's goal become clearer, there will be certain consequences for the work of courts, given the work generated by legislatures engaged in negotiation under conditions of conflicting fundamental commitments; but this paper is not primarily about the work of courts – it is about the work of legislatures.[38]

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[35] On this last point, see Martí Mármol 2005.

[36] Especially in section 4.3 on "Public justification," section 4.4 on "Justificatory constraint vs. public justification," and section 7.4 on "The public sphere as generator of popular commitments" below.

[37] Especially in subsection 7.3.2 on "Judicial review of law as pluralism" below.

[38] See Tuori 2002, 99: "It is a well-known fact that legal theory, as well as legal science in general, usually approaches the law from the perspective of the judge, and not from that of the legislator. The rationality of the law has been the central issue for legal theory, but this rationality has most often almost spontaneously been equated with the rationality of the judge and her decisions." Given the importance of judicial review to the constitutional systems of the United States, Germany, and other constitutional states from which many prominent legal philosophers come or to which they have academically emigrated (with the notable exception of the United Kingdom), legal philosophy is often obsessed with the role of courts. While early modern legal philosophers such as Thomas Hobbes, David Hume, Jeremy Bentham and John Austin focused on the work of legislatures or sovereigns, the court-centered view of jurisprudence took over by the mid-20th century. See Green 2009. The emergence of the European Court of Human Rights, the European Court of Justice, and other supranational courts interpreting supranational "legislation" has provided additional fuel for this obsession. The bureaucratization of legislation at the national (and European) level has not helped regain a focus on legislatures: much legislation in many modern bureaucratic states – not to mention states and international institutions with democratic deficits – is

1.4.2 Representative legislatures

The second ground rule, which is related to the first, is that this paper presupposes that laws intended to be binding on a population characterized by a plurality of fundamental commitments are best negotiated and adopted by legislators serving in more-or-less *representative legislatures*, rather than (a) evolved through the jurisprudence of courts (as may be the case, albeit increasingly less so, in common law jurisdictions),[39] or (b) passed by the whim of a popular majority, at least where such a majority is not checked by other constitutional institutions,[40] or (c) decreed by an executive or administrative body, at least where the laws concern conflicting fundamental commitments and are of substantial reach.[41] In passing, this paper will point out why this presupposition is reasonable, but it will not make a sustained argument on behalf of the superiority of legislatures when it comes to laws intended to bind diverse populations. Instead, it presupposes that legislatures are a useful place to resolve these issues, and perhaps a more useful place than the alternatives. As a preliminary observation, it may be pointed out that at least larger political entities do in fact, as a rule, adopt laws by way of bodies that at least somewhat resemble legislatures, at least where no common agreement, shared history, or coercion makes room for other forms of lawmaking.[42] Regardless of the relative merits of legislatures versus other forums for lawmaking, the tools developed in this paper are tailored to the *negotiation* of laws – an activity that presupposes a sufficiently large body of negotiators with more or less equal status but a wide range of different

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generated by the executive branch and modified only modestly by legislatures. See Richardson 2002 and Beaud 2009. In some jurisdictions, such as Switzerland or at the state-level in the United States, much of the interest in the legislative process is contaminated by an emphasis on direct democracy. Meanwhile, many theorists have been concerned with deliberative or participatory democracy, with a lesser emphasis on legislative process (see, e.g., Rousseau 1762, Cohen 1989, Elster 1998, Habermas 1996, Bohman and Rehg 1997, Bohman 1996, Gutmann and Thompson 2004, Barber 1984, Tushnet 1999, Kramer 2004, Marmor 2007) or have engaged in a similarly motivated, economically informed critique of democracy (see, e.g., Marti 2006, Sen 2009, Miller 2010). Comparatively little recent work has been done on legislative process and its relation to pluralism; notable exceptions are Waldron 1999a and Waldron 1999b, Wintgens 2002, Wintgens 2005, and Wintgens 2007, Bauman and Kahana 2006, and – to a lesser extent – Marmor 2007, especially 39-56 and 89-121. For a practice-oriented discussion of related challenges in the legislative process, see McLeod 2009.

[39] More sustained arguments on behalf of this claim can be found in Waldron 1999a, Waldron 1999b, Tushnet 1999, Kramer 2004, and Marmor 2007.

[40] The better suitability to pluralism of representative democracy than of direct or "pure" democracy was James Madison's central point in *The Federalist No. 10*. For other views on direct democracy, see Baldassare and Katz 2008 and, generally, Switzerland.

[41] See Richardson 2002, for an argument against unrepresentative administrative autonomy in the formulation of laws; while Richardson focuses on *popular* deliberation rather than *legislative* deliberation as a remedy, he does argue for a key role to be played by representative legislatures. See especially 193-202.

[42] Even in pluralistic countries with a strong tradition of judicial review, such as the United States, all parts of the political spectrum regularly criticize the courts when they do trammel representative decision-making. As examples on both sides, see *Citizens United v. Federal Election Commission* (campaign financing) and *Roe v. Wade* (abortion). While judicial review is widely (though not universally, see n. 366 on p. 187 below) considered an important mechanism for protecting rights of minorities (loosely defined), representative legislatures at the federal and state levels are almost universally considered the default mechanisms for crafting laws in the face of conflicting fundamental commitments.

standpoints who have the opportunity to interact with each other directly. This is not generally something one finds in courts, the people at large, or administrative agencies.

Not all representative legislatures are equal, however. Some legislatures simply serve as a way of legitimating edicts issued by a government's executive branch, by rubber-stamping laws drafted in ministries and administrative agencies, perhaps after consultation with interest groups and other "stakeholders," political parties, civil society, and so on.[43] This way of doing legislative business has become increasingly common: very little negotiation and deliberation is done in many modern legislatures, and the scope of action of such legislatures is often limited to a simple up-or-down vote, perhaps subject to minor adjustments. This is to some extent an obvious consequence of the complexity of modern legislation (especially in pluralistic societies that rely on enacted as opposed to common law) and the emergence of the bureaucratic state, as well as the often limited resources available to individual legislators. At the same time, the role of political parties and the manner in which legislators are appointed or elected may contribute to this development: in legislatures where political parties play an important role in ensuring election and in determining the relationship with the government's executive branch, deliberation by legislators may be replaced by backroom deals struck by the leaderships of political parties.[44]

This paper abstracts away from these complications and harkens back to the simpler idealization of legislatures as *deliberative bodies* where the content of legislative proposals is discussed, negotiated, and amended by individual legislators, perhaps grouped together on a case-by-case basis into like-minded factions, who consider these proposals on their merits, with a certain degree of autonomy from the coercion of political parties and the executive branch.[45] Vestiges of this idealized type of legislature still exist, perhaps most distinctly where the influence of political parties and the executive branch is minor.[46] It

[43] See Beaud 2009, 53, who claims that analyses of the respective merits of legislatures and courts must take this fact into account (here, in regard to Jeremy Waldron's privileging of legislatures): "Waldron's attempt to weigh the respective merits of judicial and legislative decision-making must take into account the fact that, increasingly, legislatures do not make the law; rather, they ratify it, after the groundwork is laid in the offices of ministers and cabinet members."

[44] A recent example in the United States is the *Middle Class Tax Relief Act of 2010*, the key elements of which were agreed between the executive branch and the leaders of the political parties in Congress. Contrast this with the extensive legislative negotiations on the *Patient Protection and Affordable Care Act of 2010* and the *American Recovery and Reinvestment Act of 2009*. Then decide what's better.

[45] See, e.g., *The Federalist No. 70* (Hamilton): "In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority." See also Nedelsky 2006 (considering the legislature as an idealized locus of collective deliberation about the common good, and the legislature as a participant in the ongoing definition of contested constitutional values).

[46] Along with the legislatures of a handful of states (a paradigmatic but turbulent historical example being the Parliament of the French Third Republic, see Lehning 2001 and Mayeur and Rebirioux 1988), certain local and regional legislatures (such as the nominally nonpartisan legislatures of Nebraska, the Northwest Territories, Nunavut and the City of Toronto) as well as the quasi-legislative organs of some international organizations come to mind. The negotiating dynamics of bodies such as the General Assembly of the United

remains an open question to what extent this idealization can still be grafted onto actually existing legislatures, but this paper suggests that something resembling this idealized conception of legislatures as deliberative bodies is conducive to the negotiation and adoption of legislation adequate to the plurality of conflicting fundamental commitments held by members of a diverse population.

1.4.3 No presupposition of political conceptions

The third ground rule, and perhaps the most problematic and the most liable to being broken, is that this paper does not presuppose a commitment to any normative political conceptions, including political liberalism or even democracy, other than the **commitment to pluralism**.[47] The author's personal commitment to democracy and some form of liberalism will no doubt shine through the cracks in the paper's logic, but the author will nevertheless try to make a distinction between a commitment to democracy, liberalism, and other political conceptions on the one hand, and a commitment to pluralism on the other hand – commitments which admittedly often go hand in hand in practice.[48] This paper aims to describe a way of negotiating and adopting legislation in societies (or worlds) committed to pluralism, in the sense of accepting the irreducible plurality of fundamental commitments and worldviews within a population and of granting prima facie equal validity to all such commitments and worldviews brought to the negotiating chamber – even where such commitments and worldviews are incompatible with democracy, liberalism, and similar commitments (distinct from pluralism) concerning how political and social life should be ordered. This notion of pluralism will be discussed in considerably more detail below, and establishing this distinction between pluralism and other forms of political commitment is a crucial lemma for constructing this paper's overarching theory.

There is a tension between the second and third of these ground rules. The second ground rule presupposes that legislation in a pluralistic society is best

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Nations, for instance, come strikingly close to this idealized conception of the deliberative nature of legislatures, despite obvious deficits in other respects.

[47] On political conceptions of justice and persons, see Rawls 2005, 11-15 and 29-35. According to Rawls 2005, 11, "[A political conception] is, of course, a moral conception, it is a moral conception worked out for a specific kind of subject, namely, for political, social and economic institutions [internal citation omitted]." In the associated footnote 11, Rawls expounds what he means by "moral:" "In saying that a conception is moral, I mean, among other things, that its content is given by certain ideals, principles and standards; and that these norms articulate certain values, in this case political values." Political conceptions are thus inextricably caught up in the fundamental commitments that motivated them; to say here that law of pluralism does not presuppose any political conceptions means that the commitment to pluralism aspires to be the only fundamental commitment grounding law as pluralism.

[48] Though not always: Kekes 1993 (with a more positive spin) and Gray 2000 (with a more negative spin) explicitly dissociate pluralism from liberalism, and the critiques of liberalism by Carter 1993 and Eberle 2002 amount to an endorsement of pluralism over liberalism. Communitarians such as Charles Taylor (e.g., Taylor 2007) and Alasdair MacIntyre (e.g., MacIntyre 2007), who generally endorse the coexistence of only partially overlapping communities shaped by their common histories and worldviews, arguably likewise endorse pluralism over liberalism where the two conflict.

negotiated and adopted by representative legislatures; the third ground rule appears to imply that commitments to democracy and liberalism should be cast aside when designing a mechanism for negotiating and adopting laws in a pluralistic society. But doesn't the notion of a representative legislature presuppose democracy and liberalism? Not necessarily – and this paper tries to squeeze considerable mileage out of that qualification. For the purposes of this argument, "representative" means that the range of commitments and worldviews within the legislature is roughly reflective of the range of commitments and worldviews of the population bound by the laws negotiated and adopted by the legislature. It says nothing prima facie about the way the legislature is constituted or elected, or about how the legislature stands in relation to the rest of the political, economic or social system of the population in question. It merely means that, given a legislature with the power to pass laws that bind a population, the legislators should either, by and large, hold the same range of commitments as that population, or should be able, by and large, to represent that range of commitments during the negotiation and adoption of laws.[49]

1.4.4 Fundamental commitments, not interests

The fourth and last ground rule is that this paper is concerned not with the negotiation and adoption of legislation characterized by conflicting *interests*, but rather only by conflicting *fundamental commitments*. Even in a society (or world) where everyone, and in particular all legislators, shared the same beliefs, values, and other commitments, there would still be conflict over the general purposes and specific details of legislation due to differences in economic and social standing, gender, age, race, language, sexual orientation, family circumstances, and other *contingent characteristics*. This paper ignores conflicts arising from disparate interests where fundamental commitments are identical, or at least compatible. It is only interested in conflicts over legislation that would arise if persons – or, specifically, legislators – took a God's eye view of the legislation, so to speak, assessing it in terms of its adequateness to the fundamental commitments they hold, without regard to their other characteristics. A convenient way of looking at this is to invoke a modified sort of original position or veil of ignorance: this paper is interested in conflicts that arise when all characteristics of a person (or legislator) in the original position are ignored, except for the person's fundamental commitments, i.e., when the veil of ignorance is transparent only with regard to fundamental commitments. [50]

[49] The partial success of "deliberative polling" in ostensibly undemocratic societies such as China indicates the possibility of representation without liberal democracy. See Fishkin, He, Luskin, and Siu 2010. For a general analysis of what it means for a legislature to be representative, and how a legislature should be representative, see Besson 2005.

[50] Cf. Rawls 1999a, 11: "Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know *their conceptions of the good* or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance [emphasis added]." The italicized phrase concerns fundamental commitments; the other characteristics enumerated by Rawls are contingent.

Naturally, contingent characteristics such as economic and social standing, race, gender, etc., have a substantial impact on the fundamental commitments held by the people characterized by these factors: sexual orientation likely influences whether someone believes gay marriage is a sin; gender likely influences whether someone values the freedom to have a legal abortion; and the size of someone's bank account and paycheck likely influences whether one believes progressive taxation is just. One may believe that conflicting commitments are in fact nothing other than veiled or coded interests, that there is no such thing as a commitment beyond an interest.

Whether or not that belief is true, the belief itself is a fundamental commitment (or is derived from fundamental commitments) and is neither presupposed nor refuted by this paper. The paper assumes merely that there is some value in talking about fundamental commitments as if they exist and are relevant to decision-making (or that some members of the population may believe there is some such value), regardless of whether they are rooted in contingent characteristics such as someone's standing in life or whether they originate in a sacred text, revelation, moral intuition, or reason and logic. In this sense, it makes no difference to the argument presented here whether fundamental commitments have an independent existence or whether they are simply an abstraction or translation of other, contingent characteristics. This approach seems justified especially in light of the raging public debate on "religion and politics,"[51] "values voters,"[52] "Islamization"[53] and so on, which indicates the importance that many people attach to their fundamental commitments (or the fear they have of other people's fundamental commitments) and the role those commitments should or should not play in the negotiation and adoption of legislation, regardless of where the commitments come from or what they stand for or turn out to be reducible to in the final analysis. Even if fundamental commitments should turn out to be reducible to or explainable in terms of contingent characteristics of the individuals who hold such commitments, fundamental commitments serve as reasons advanced for political and hence legislative positions in practice and will continue to do so for the foreseeable future.

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[51] There are more recent books and articles on religion and politics than there are words in this paper. Some of the more perceptive, coming from diverse points of the political and religious spectrums, include Douglass and Mitchell 2000 (a collection of essays generally advocating a greater, but nuanced role for religion in public life), Drinan 2004 (considering religious freedom in the context of international law), Wallis 2005 (a leftist call to reclaim the moral high ground in politics), Danforth 2006 (an Episcopal priest and former Republican senator arguing for a pragmatic approach to faith and politics), Lilla 2007 (a historicist defense of the separation of a church and state), and Pottenger 2007 (an analysis of the contemporary international challenges to liberal democracy worldwide). Some of the less perceptive, but more successful commercially, include the "New Atheists" Harris 2004, Dawkins 2006 and Hitchens 2007.

[52] Values voters were widely blamed and/or applauded for the (re-)election of George W. Bush in 2004. But see Brooks 2004 for a critical analysis. Lest anyone doubt the role fundamental commitments are at least purported to play in contemporary politics, see http://www.valuevotersusa.com and http://www.valuesvotersummit.org.

[53] At the latest since September 11, 2001, Westerners have rediscovered their latent fear of Islam. This has given the world Geert Wilders and Heinz-Christian Strache, as well as more academic critiques such as Ibn Warraq 1995, Hirsi Ali 2006, and Mueller 2009, 116-135. For less apocalyptic views, see Abou El Fadl 2004, Cesari 2004, Ramadan 2004, Aslan 2005, Charfi 2005, Feldman 2008, and Esposito 2010.

A related objection to the exclusive focus on fundamental commitments may be that one's economic and social standing, gender, etc., cannot possibly be abstracted away when considering legislation in the original position or from behind the veil of ignorance, i.e., that the very idea of the original position or similar device presupposes certain such characteristics of the participants therein, such as a white male conception of rationality. This is a point forcibly made by some feminist theorists and other critics of the original position and the like, and the point is well taken.[54] This paper accordingly does not argue that the original position is a feasible or even useful device for thinking about the negotiation of legislation in practice; the paper merely puts a theoretical focus on the elements of conflicts involving legislation that arise due to disparities in the fundamental commitments of the legislators (or of the people the legislators represent) and leaves aside the elements of conflicts that arise due to disparities in social standing, gender, etc., whether or not such disparities can or should in fact be left aside during the negotiation and adoption of legislation. To the extent such disparities give rise to conflicting fundamental commitments, those disparities are taken into account even in the theoretical consideration.

Given these theoretical distinctions between fundamental commitments and contingent characteristics such as interests, we can define more precisely what is meant by *law as pluralism*, implementation of which is the normative goal of this papers: Law as pluralism denotes written legislation negotiated and adopted by representative legislatures under conditions of conflicting fundamental commitments, where such legislation is adequate to those commitments. Law as pluralism can be distinguished from *law as particularism*, which denotes written legislation negotiated and adopted by representative legislatures where the fundamental commitments of the population bound by the legislation do not conflict or where such conflicts are irrelevant to the legislation, i.e., where conflicts arise exclusively over divergent contingent characteristics. At any given level of legislation, law may vacillate between law as particularism and law as pluralism or contain elements of both: where conflicts between fundamental commitments are irrelevant to the negotiation and adoption of legislation, legislation is law as particularism; where such conflicts are relevant, legislation is law as pluralism. Even within a given piece of legislation, some legislative provisions may be deemed law as particularism, while others may be deemed law as pluralism. Law as particularism and law as pluralism constitute two poles between which all legislation is spread out.

1.5 Methodological premises

Now that the paper's goals have been staked out, the key terms have been defined or at least outlined, and the ground rules have been established, we can take a brief look at the methodological premises adopted by this paper. These methodological premises are the basic tools the paper employs to achieve its goals.

[54] See, e.g., Matsuda 1986 and Okin 1989.

1.5.1 Lawmaking as a linguistic and discursive practice

The first methodological premise is that *lawmaking* is *discourse*, and *legislation* is a *written text*.[55] These are both *manifestations of language*.[56] In order to understand what legislators do when they legislate, and in order to suggest improvements to what they do, we must first understand lawmaking as, in part, a *linguistic practice*.[57] Legislators use language when they submit, consider, and discuss legislative proposals, and they use language when they draft the legislation that is adopted. More specifically, lawmaking is a *discursive* practice, in the sense that legislators give and ask for reasons when submitting, considering, and discussing legislative proposals.[58] In order to understand what legislators do when they legislate, and in order to suggest improvements to what they do, we must understand the *justifications* that legislators produce while legislating, and we must decide whether some classes of justifications are more likely to lead to adequate legislation than others.

For that purpose, this paper draws on the *inferential* model of discursive practice developed by Robert Brandom within the philosophy of language.[59]

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[55] On the difficulties in bridging these two, see Cyrul 2007.

[56] The intimate connection between law and language has long interested legal philosophers, going back at least to Bentham 1776 and Bentham 1782/1970. See generally Endicott 2010. It has a strong tradition in legal positivism, most prominently Hart 1994 (especially the notion of "open texture," drawing on Friedrich Waismann and indirectly Ludwig Wittgenstein). Wittgenstein 2008 (especially on rule-following and family resemblances) has exerted a particular fascination, as has Kripke 1982, channeling Wittgenstein in his own way (on rule-following). For recent applications of Wittgenstein and/or Kripke to law and critiques thereof, see Patterson 1996 and Patterson 2004, especially Bobbitt 2004 and Bix 2004. Despite the fertility of Wittgenstein for legal philosophy, Wittgenstein is notoriously prone to misinterpretation, as Kripke and/or his critics demonstrate. The approach taken by legal positivists has accordingly also been criticized in this regard, see, e.g., Dworkin 1977. Habermas 1984 and Habermas 1996 (drawing on the linguistic theories of C. S. Peirce, J. L. Austin, and John Searle) and Alexy 1989 (drawing on Wittgenstein, Austin, and Habermas) have shown how legal argumentation can be grounded in practical discourse. Other notable contributions to law and language include Bix 1993 (critically discussing Hart, Wittgenstein, Dworkin and Michael Moore), Fish 1989 (drawing parallels between literary and legal theory), and Hurley 1989 (using Wittgenstein and Donald Davidson to develop parallels between the structure of personality and the structure of society).

[57] For an overview of practice theory as applied to law, see Patterson 2009. The claim here is not that *law* is a linguistic practice, merely that *lawmaking* is (in part) a linguistic practice. See also Marmor 2008 (on the pragmatics of legal language in light of Paul Grice).

[58] Legislators do not *always* give and ask for reasons; in some cases, it may in fact be politically imprudent for them to do so. See Atienza 2005, 309. This paper analyzes what kinds of justifications should be given *to the extent they are given*, and it analyzes the adequacy of legislation in terms of justifications that *could be given*. For a critical consideration of what it means for legislatures to be discursive, see Cyrul 2005.

[59] This inferential account of discursive practice is articulated primarily in Brandom's magnum opus *Making It Explicit* (1994) and summarized in *Articulating Reasons* (2000a), which provides the best introduction to inferentialism. See Wanderer 2008 for a general overview of Brandom, and Weiss and Wanderer 2010 and Stekeler-Weithofer 2008 for critical discussions of his work. Brandom's social account of inferentialism is both Hegelian and pragmatic (as well as pragmatist) in spirit and builds primarily on Wilfrid Sellars, Michael Dummett, and Donald Davidson, as well as Ludwig Wittgenstein, Gottlob Frege, and Immanuel Kant. Others have made use of Brandom in legal philosophy, but generally with respect to *interpretation, adjudication,* and *argumentation* as opposed to *lawmaking*. For an overview of the inferentialist approach to interpretation and adjudication, see Canale and Tuzet 2007. Patterson 2009 also draws on Brandom for his practice theory of law. The most impressive work to date applying Brandom to legal interpretation and argumentation is Klatt 2008.

The salient aspects of this model will be introduced as appropriate throughout the paper. Note that the paper takes no stance on the ontological status of Brandom's theory per se, i.e., whether it is a suitable or veridical representation of linguistic and discursive practice as such. The paper merely makes the claim that certain tools developed by Brandom lend themselves readily to an analysis of *legislative* practice, and in particular to lawmaking under conditions of conflicting fundamental commitments.

This linguistic/discursive approach to the problem of negotiating legislation under conditions of conflicting fundamental commitments is closely related to the problem of *public justification* as limited to legislatures.[60] It also entails looking at what *legislatures* do when negotiating and adopting legislation, not just what *legislators* do. Legislatures are likewise engaged in the *linguistic, discursive* project of generating legislative texts, above and beyond what individual legislators do as part of that project, and these texts stand in need of justification. The extent to which such justification is actually offered by legislators and legislatures, and the way in which it should be offered in relation to fundamental commitments, is a key issue considered by this paper.[61]

1.5.2 Lawmaking as an algorithmic undertaking

The second methodological premise is that lawmaking is, in part, an *algorithmic* undertaking, i.e., it is governed by *rules* that have been established to solve the problem of generating a legislative text as output given the inputs to the legislative process.[62] The concern of this paper is with the rules that

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Habermas 2000 and Brandom 2000b offer a spirited debate on Brandom's pragmatic philosophy of language, with implications for legal and political philosophy. Brandom himself has not directly engaged in legal philosophy, but his work is replete with legal metaphors and examples, see especially "History, Reason, and Reality," in Brandom 2009, 78-108. Brandom 2000b ends with the suggestion that his pragmatic theory of language might lend itself to applications in moral theory; this paper is an attempt to do just that in the field of lawmaking.

[60] The seminal work in this regard is Rawls 2005. Public justification will be discussed in more detail in sections 4.3 and 4.4 below; for a general overview, see D'Agostino 2008.

[61] A corollary of this methodological premise is the paper's focus on lawmaking as an *actual* linguistic practice, not some counterfactual or idealized version thereof. In particular, this paper is not concerned with "ideal speech situations" (see., e.g., Habermas 1973) or "pragmatic presuppositions" of communication (see, e.g., Habermas 2008). Crucially, there is no presupposition that legislators use the same linguistic expressions in the same way; this is the core of Brandom's critique of Habermas cited as this paper's first epigraph, see Brandom 2000b, 363: "To begin with, mutual understanding in the strong sense Habermas is insisting upon is *not* required for the undertaking of joint projects. The perspectival theory of conceptual contents explains how the content of a genuinely shared aim, like that of a genuinely shared belief or concept, and even the content of a *joint* (and not merely shared) intention – what Sellars calls 'we'-intentions – can appropriately be subject to different specifications by the various individuals who nonetheless share it. The participants do not need all to be doing the same thing (sharing) in a narrow sense in order to be engaged in a joint enterprise, and in that broader sense to be doing the same thing (sharing)." What this paper *does* do, however, is exploit the algorithmic features of lawmaking, and in particular the possibility of using *rules* to constrain lawmaking, in order to *idealize* the actual discursive practice engaged in by legislators. Idealization is thus a goal, not a presupposition, of this paper.

[62] That rules constrain or purport to constrain lawmaking is trivial, in the form of rules of legislative procedure and constitutional rules that determine what legislators and legislatures

establish the legislative framework, and especially the rules governing a specific class of inputs to the legislative process, namely the fundamental commitments of the population to be bound by the legislation generated by the process.

Where are the rules set out that govern the legislative process? Primarily, they are set out in the *constitution* that establishes and legitimizes the legislature in question, and secondarily in the *rules of procedure* of the legislature. While many, and probably the most important, of these *constitutional rules* and *procedural rules* are in writing, some of the rules may be oral or customary.[63] Moreover, some rules may be *meta-constitutional*, i.e., they govern the way constitutional rules (and procedural rules) are executed. What is important is that such rules exist in some form or other, and that, in order to improve the legislative process, they can be formalized as algorithms to achieve the goal of legislation that is adequate to conflicting fundamental commitments.

Lawmaking is algorithmic only *in part*, however, because once the framework of the legislative process has been staked out by such rules, there is considerable leeway within that framework for legislators to behave in a potentially non-algorithmic manner when negotiating and adopting legislation.[64] The second methodological premise does not deny that individual legislators have a mind of their own and thus that their behavior is not strictly rule-bound. The same applies to legislatures as legislators acting collectively: legislatures are "only human" and hence only partially susceptible to being told what to do. Legislators and legislatures are not computer programs that simply execute algorithms in a deterministic manner.

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can validly or legally or constitutionally do. The stronger claim here is that at least some of these rules can be *formalized* as algorithms, i.e., they could also be executed by automata – which legislators and legislatures at least trivially are not. This claim has been put to use in the field of artificial intelligence and law, the seminal work of which is McCarty 1977 (applying automatization to corporate tax law). Broadly speaking, such algorithms attempt to formalize the rationality involved in lawmaking and legal interpretation. Recent discussions include Voermans 2002 (for assisting legislative drafting and legal problem solving), Wahlgren 2007 (on formalizing legislative techniques), and Moens 2007 (focusing on techniques for representation and search of legal norms). The motivation for many of these projects is to facilitate dealing with the sheer volume of legislative materials; in contrast, the present paper examines which aspects of legal justification under conditions of conflicting fundamental commitments can be formalized, so that they can in turn be incorporated into appropriate rules of legislative procedure, constitutional and meta-constitutional rules, and critical tools for assessing the adequacy of legislation. By following these formally defined rules, legislators and legislatures implement law as pluralism.

[63] At the level of international law, customary rules as opposed to written rules have traditionally been more common; the trend toward codification is comparatively recent, especially after the end of the Second World War and the establishment of the United Nations. Customary rules of this sort are also common in states without written constitutions, such as the United Kingdom, Israel and New Zealand – but here again, there has been a trend toward codification, as evidenced by adoption of the *Human Rights Act 1998* in the UK and the Bill of Rights Act in New Zealand (see Erdos 2007). For purposes of simplification, the term "rules" in this paper will encompass meta-constitutional, constitutional, and procedural rules, whether written, oral or customary, as well as rules with similar functions at the global level.

[64] This makes room for *creativity* in lawmaking that goes beyond mere *rule-following*. On parallels in the creative development of practical abilities in general, see Brandom 2008, 86: "The way in which prior abilities are recruited by training in the service of developing new ones is in general unsystematic, not codifiable in rules or algorithms, and not predictable or explicable from first principles."

What the second methodological premise does mean is that certain rules set out in constitutions and rules of procedure *constrain* what legislators and legislatures can and should do in order to generate legislation – they serve as constraints on the legislative process.[65] Understanding these rules and what they imply for the legislative texts generated is key to understanding what legislators do when negotiating and adopting legislation, and tweaking these rules to improve the adequacy of legislative texts in relation to the fundamental commitments held by the population bound by those texts is key to pursuing this paper's normative goal. Under this algorithmic conception, the legislative process is a function that takes fundamental commitments as input (along with other inputs such as interests and external circumstances) and generates legislative texts as output. This paper considers the rules that define that function and suggests how to debug it in respect of adequacy to fundamental commitments.

To facilitate the formal definition of the rules constraining the legislative process, this paper will make heavy use of symbolic notation based on first-order logic, as well as set theory and pseudocode. This does not imply that legal reasoning or legislative justification is strictly *logical*, and even less that there is one right, logical answer to any question of judgment or inference raised during the legislative process.[66] Rather, the symbolic notion serves an *expressive* function, making the practices explicit that the legislature engages in when negotiating law as pluralism.[67] Expressing the process of legislative justification in this way achieves clarity both for the purpose of explicating law as pluralism and for the purpose of defining the rules proposed for constraining the legislative process.[68]

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[65] Why should such constraints even be necessary? Wouldn't it suffice to let legislators do as they please, and have them thrown out of office if they fail to perform adequately? This question predates this paper by several centuries; see, e.g., *The Federalist No. 51* (Madison): "The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control of government; but experience has taught mankind the necessity of auxiliary precautions." On the constrainability of legislatures (and legislators) in a modern context, see Schauer 2006.

[66] On the dangers of taking logic in law too seriously, see Haack 2007.

[67] This tracks Brandom's *expressivist* conception of logic, drawing on early Gottlob Frege and Wilfrid Sellars, and makes the practice of giving and asking for reasons explicit that is fundamental to the legislative process. See Brandom 2000a, 76: "In Sellars's characterization of expressive rationality, modal claims are assigned the expressive role of inference licenses, which make explicit a commitment that is implicit in the use of conceptual contents antecedently in play. Rules of this sort assert an authority over future practice, and answer for their entitlement both to the prior practice being codified and to concomitant inferential and doxastic commitments. In this way they may be likened to the principle formulated by judges at common law, intended both to codify prior practice, as represented by precedent, expressing explicitly as a rule what was implicit therein, and to have regulative authority for subsequent practice. The expressive task of making material inferential commitments explicit plays an essential role in the reflectively rational Socratic practice of harmonizing our commitments. For a commitment to become explicit is for it to be thrown into the game of giving and asking for reasons as something whose justification, in terms of other commitments and entitlements, is liable to question."

[68] The expressivist function of logical notation with regard to individual justifications and their relationships to each other fits smoothly with the expressivist function of algorithms

1.5.3 Lawmaking as a multi-level undertaking

The third methodological premise is that the negotiation and adoption of legislation is a *multi-level* undertaking. This means that legislation and the legislative process must be looked at with reference to the population subject to the jurisdiction of the legislature in question, i.e., the population to be bound by the legislation generated by the legislature, where that population or a subset thereof may also be subject to the jurisdiction of other legislatures, i.e., may be bound by legislation generated by other legislatures. Traditionally, a given individual in a population is bound by legislation generated by distinct legislatures that stand in a hierarchical relationship to each other, or that have hierarchically defined scopes of competence, such as under federalism or the principle of subsidiarity.[69] These hierarchical relationships are traditionally defined by constitutions. However, a given individual in a population may also be bound by legislation generated by distinct legislatures that stand in a non-hierarchical relationship with each other, such as in the case of diplomats posted in a foreign country, who may be subject to legislation adopted by their home legislature and at least some legislation adopted by their host legislature;[70] common citizens of one country residing in another country, who may be subject to tax, military conscription, or other legislation adopted by the legislature of their country of origin and other such legislation adopted by their country of residence;[71] and corporations and legal entities whose domiciles, places of business, and markets are spread out across numerous jurisdictions – the subject matter of conflicts of laws. More interesting for our purposes is when different sources

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with regard to the legislative process that makes use of those justifications. Cf. Brandom 2008, 33: "What thinking about automata in this broad sense will do is to teach us that *algorithmic elaboration* of primitive abilities into complex ones plays the same role in *pragmatic* analysis that *logic* does in *semantic* analysis. Algorithmic elaboration is a kind of logic of practical abilities."

[69] More often than not, federal arrangements have come about through a confluence of historically contingent factors, such as where previously independent or quasi-autonomous states came together to form a federation or confederation (e.g., the United States, Switzerland, the European Union) or where ethnic differences or geographic extension made federalism the most practical administrative option (e.g., Belgium, Brazil, India, Ethiopia, Australia, Canada). Where federalism has in part been theoretically motivated, it has often been justified in terms of political checks and balances between the different levels of government; see, e.g., *The Federalist No. 28* (Hamilton), *No. 46* (Madison), and *No. 51* (Madison), Morton White 1987, 163-165, and Frey 2001. While the principle of subsidiarity has its roots in Catholic social thought (see von Nell-Breuning 1952), its most prominent contemporary manifestation (namely, as the structural principle of the European Union; see article 5(3) of the *Consolidated Version of the Treaty on European Union* and the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*) is primarily economically and historically motivated, rather than by fundamental commitments. The present paper is only interested in federalism and other multi-level conceptions of lawmaking in relation to the *conflicting fundamental commitments* of a population, not historical contingencies. For a discussion of the relationship between federalism and fundamental commitments and its application to Germany, India, and the United States, see Everett 1997. For a more general analysis of religious diversity and federalism, see Elazar 2001.

[70] See articles 29-42 of the *Vienna Convention on Diplomatic Relations*.

[71] For instance, U.S. citizens residing outside the United States are subject to both U.S. and local tax laws.

of law apply to the same individual in light of that individual's fundamental commitments – most prominently, in light of his or her religious affiliation.[72]

A brief terminological note in this regard: given that legislatures may be arranged hierarchically or *non*-hierarchically, it is not always strictly accurate to speak of legislative *levels*. While the term "level" will generally be used for the sake of simplicity, the expression "legislative jurisdiction" will sometimes be used as a more precise alternative. Either term refers to the population or subset of a population bound by a given legislature, whether the arrangement in which that legislature is situated is hierarchical or non-hierarchical, overlapping or non-overlapping, territorial or non-territorial, and so on.

Pursuant to this methodological premise, legislation and lawmaking are considered to be *fundamentally* multi-level, and can only be fully understood when examined within a multi-level context. Legislation as negotiated and adopted by a single legislature at a single level, with universal application to all the members of a population, is the exception in both theory and practice. Especially where fundamental commitments are at stake, the level-specific bindingness of legislation must be taken into account. While the preliminary consideration of law as pluralism in chapters 2 to 5 of this paper adopts the common simplifying assumption of a single legislature negotiating and adopting universally binding laws, the multi-level nature of lawmaking and legislation should always be kept in the back of the reader's mind. In chapter 6 on "Recursive pluralism," the treatment in the first few chapters will be explicitly expanded to include multiple levels arranged both hierarchically

[72] There has recently been a resurgence of interest in non-hierarchical and overlapping forms of legal organization and multiple sources of binding law, not just in the colonial and post-colonial contexts that traditionally have been associated with these phenomena. This is in part due to economic and social globalization, and in part due to the challenges of accommodating religious minorities within immigrant societies – most conspicuously Muslims within the traditionally Judeo-Christian societies of North America and Western Europe. Examples of such non-hierarchical and overlapping jurisdictions are discussed in Frey 2001 (a proposal for "functional, overlapping, competing jurisdictions," primarily for economic purposes), Kucukcan 2003 (religious accommodation in the Ottoman Empire and Turkey), Swaine 2005 (theocratic communities in liberal democracies), Williams 2008 (Islam in the West), and Rosenfeld 2008 (a general analysis of highly layered and segmented constitutional ordering). These projects fall under the general rubric of "legal pluralism." Law as pluralism is thematically related to legal pluralism, the paradigmatic discussion of which is Griffiths 1986, which distinguishes legal pluralism from the dominant paradigm of "legal centralism," according to which "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state." In contrast, a "situation of legal pluralism… is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all the multifarious social fields present…" One superficial difference between law as pluralism and legal pluralism à la Griffiths is that the former project is explicitly normative, while the latter is ostensibly descriptive. More crucially, law as pluralism abides by the key tenet of "legal centralism," namely that law is part of a single legal order rooted in the state (or, utopianly, the international legal order). While law as pluralism recognizes "other, lesser normative orderings" and does not presuppose that law should necessarily be "uniform for all persons," it does situate the diversity of legal norms within a single legal order. Chapter 6 on "Recursive pluralism" below expressly shows how pluralistic commitments across various legislative jurisdictions can be unified within such a single legal order.

and non-hierarchically, in accordance with the constellations of fundamental commitments at each level.

1.6 Toward law as pluralism

In light of these ground rules and methodological premises, the following chapters[73] will flesh out the theoretical constructs and the practical tools necessary to pursue the normative goal of this paper: namely to define rules for the negotiation and adoption of laws so that, in each legislative jurisdiction, the laws are adequate to the potentially conflicting fundamental commitments of the members of the population in that legislative jurisdiction.

These constructs and tools include a **normative conception of pluralism** (2.2) that can be committed to (2.3) for the achievement of this paper's normative goal; the distinctions between **fundamental** and **subsidiary** commitments (3.1), **popular** and **legislative commitments** (3.2), and **prescriptive** and **descriptive commitments** (3.3); the **regulative ideal of law as pluralism** (4.1); the **justificatory constraint of law as pluralism** (4.2 to 4.7); the **decomposition** (5.1) and **synthesis** (5.2 to 5.4) of commitments to bridge the gap between legislative input and legislative output; and the device of **recursive pluralism** (6), which makes use of the distinction between **tight** and **loose consensus** (6.2) and of **termination conditions** defined in terms of **enforceability** (6.7).

The conclusion of this paper will consider the implementation of law as pluralism (7) – in particular, how to **make justifications explicit** (7.1), the formulation of appropriate rules of legislative procedure (7.2), constitutional rules, and meta-constitutional rules (7.3); the relationship between courts and legislatures under law as pluralism (7.3.2); the relationship between law as pluralism and the public sphere (7.4); international law as pluralism (7.5); and law as pluralism as a critical tool (7.6). The paper concludes with an Appendix (8) containing the formal algorithmic definition of law as pluralism and References (9).

Using these constructs and tools, the conception of law as pluralism as set out in the first paragraph of this introduction can be restated more formally and more precisely as follows, thereby also summarizing the main arguments of this paper:

Law as pluralism denotes legislation negotiated and adopted under conditions of conflicting **fundamental commitments**; these commitments may be either **prescriptive** or **descriptive**. Under the **conception of pluralism** put forward here, prima facie equal validity is accorded to all commitments held by a population, i.e., to all **popular commitments**, even where such commitments are incompatible with each other. Under the corollary **regulative ideal of law as pluralism**, laws – which express **legislative commitments** – should prima facie only bind members of the population whose fundamental commitments do not conflict with those legislative commitments – any deviation from this regulative ideal must be justified. This

[73] The paper is divided into nine *chapters*, including the Appendix and the References, each of which may be divided into *sections*, which in turn may be divided into *subsections*.

has consequences for the negotiation and adoption of legislation: while *descriptive* fundamental commitments held by members of the population or legislature may serve as justifications for positions taken during legislative negotiations and hence may serve indirectly as a basis for legislative output commitments, *prescriptive* fundamental commitments held by members of the population or legislature directly prejudice the content of legislative commitments and hence should not serve as justifications for positions taken during legislative negotiations if they conflict with other such prescriptive fundamental commitments. According to the **justificatory constraint of law as pluralism**, giving descriptive fundamental commitments as justifications is compatible with the regulative ideal of law as pluralism, while giving prescriptive fundamental commitments as justifications that conflict with other such prescriptive fundamental commitments is not. Controversial prescriptive commitments can be "smuggled into" the legislative process, however, by first **decomposing** them into descriptive commitments and uncontroversial prescriptive commitments, and then **synthesizing** them into legislative proposals. Using the device of **recursive pluralism**, legislation can be negotiated at multiple levels with the goal of achieving at least **loose consensus** at each level, according to which the laws adopted are **adequate** to the various fundamental commitments held by the population at a given level, even where those commitments are mutually incompatible. Legislation is negotiated at descending levels until **tight consensus** is reached at some level. Where legislation is adopted without achieving tight consensus or loose consensus at each level, legislation can be **made explicit** by giving justifications stated in terms of **enforceability** as to why a given legislative commitment should apply at a given legislative level despite the inability to achieve tight or loose consensus. Making justifications explicit is also recommended to ensure that law as pluralism honors the principle of **integrity** across laws generated from one legislative process to the next.

Using these constructs and tools for the negotiation and adoption of laws, law as pluralism facilitates the undertaking of joint legislative projects even where mutual understanding is not achievable.

2 An adequate conception of pluralism

2.1 The fact of pluralism

If all human beings shared the same fundamental commitments and the same interests, there would be no need for law. The state of nature would be lawless yet harmonious: each one of us would, instinctively and rationally, act in a manner adequate to our own commitments and interests, as well as to the commitments and interests of everyone else.[74] Workers would be happy to work for the owners of the means of production at the wages the owners saw fit, and owners would be happy to pay workers the wages the workers saw fit; fetuses would only be aborted, if at all, up to the time everyone agreed was both moral and convenient; and everyone would only marry the spouses everyone else approved of. We would all pay the taxes we all agreed were just and sufficient, without being reminded to fill out our tax returns accurately and completely and on time, or we would all pay-as-we-go for public services, to the extent any existed. Polluters would only pollute in a mutually agreed, sustainable manner, or no one would care that they were living in a world slowly choking on its own excesses; and war would be either a bloodless sport or a pastime for a population of masochists.

Human beings do not always share the same fundamental commitments and the same interests, however. This is where law becomes necessary. Law mediates between conflicting interests and conflicting commitments – it coordinates our collective action by imposing norms on each of us individuals and groups of individuals. It provides incentives for us to comply with the socially negotiated norms, and it punishes us when we fail to comply. It tempts us, cajoles us, coerces us. We are called upon to accept the authority of law, even when the norms imposed by law conflict with the interests and commitments we hold dear as a consequence of our upbringing, education, life experiences, and religious, philosophical and ethical convictions. Law does violence to our interests and commitments, but if crafted well, it gives us something in return that we would otherwise be unable to enjoy in a world filled with interests and commitments that conflict with our own.

In small, homogeneous populations with a common history, culture and religion, the conflicts mediated by law are predominantly conflicts arising from interests, not fundamental commitments. Even in homogeneous societies, there are still rich and poor, factory owner and worker, ruler and ruled. Law in such homogeneous, particularistic societies guides human behavior in such a way as to balance the disparate interests of the members of society who, by birth, choice or chance, are in different life situations giving rise to different, potentially conflicting interests. The employee wants to be paid more; the shareholder wants to generate a higher profit. The ruled wants the freedom to lead an autonomous life (or to be given reliable and predictable guidance on how to lead a heteronomous life); the ruler wants to exercise as unrestricted power as possible over his subjects and to enjoy the spoils of that power as undisturbed as possible.

[74] *Pace* Hobbes 1651.

Migration, economic and cultural globalization, the spread and acceleration of transportation and telecommunication technologies, and the resulting greater awareness of other ways of living have led to the dissolution, fragmentation, and intermixing of the small, homogeneous populations that have characterized much of human history and, hence, political philosophy. Such homogeneity may still exist in the occasional isolated Asian jungle, African savannah, American plain or European mountain valley – but homogeneity is rapidly joining the mammoth and the dodo bird in the graveyard of human-facilitated evolutionary casualties. Particularism has been replaced by pluralism as the dominant narrative of our age.

Some would argue that the emerging heterogeneity is primarily a heterogeneity of interests, not fundamental commitments – that in our disparate hearts, we all roughly believe and value the same things, but that our different positions in life lead us to express our divergent interests in the form of distinct, more-or-less comprehensive religious, philosophical, or ethical worldviews that emphasize commitments over interests, providing metaphysical cover for our pecuniary drives. This may very well be the case: it pays to be agnostic about such things, if only to avoid straying onto a metaphysical limb that could be sawed off at any time by the dialectics of false consciousness and public choice theory. Nevertheless: the *language* of fundamental commitments plays a domineering role in our pluralistic age, and we ignore it at our peril: even if it should turn out that everyone is, in a cognitively dissonant way, guided by brute interests, not lofty fundamental commitments, we all have an interest in believing and making others believe that we are guided by commitments instead of mere interests. Religions and philosophy departments have not succeeded by denying the central role values play in our self-image as human beings – they have succeeded by articulating fundamental visions that emphasize the distinctness and superiority of some worldviews in contrast with others.

Pluralism of fundamental commitments and the worldviews they are part of is an unavoidable fact of our current human and social condition. This fact of pluralism in the contemporary world must be taken to include conflicting fundamental commitments, not just conflicting interests, if a solution is to be found to the problem of how law is to govern populations characterized by a plurality of conflicting fundamental commitments.

The **fact of pluralism** we are interested in here is therefore a pluralism of *fundamental commitments*, not a pluralism of interests.[75] This means that in a given population, there is a wide range of fundamental commitments held by different members of that population, and some or many of these fundamental commitments may conflict with each other. What it means for fundamental commitments to *conflict* with each other is that they cannot be held at the same time without contradiction, i.e., they are incompatible with each other: a fundamental commitment that "all humans are equal" is incompatible with the fundamental commitment that "blacks are inferior to

[75] Others have referred to this as *value pluralism*, notably Berlin 1959/2003, Raz 1988, Galston 2002, and Crowder 2002. Note that what we are interested in here is the fact of pluralism *as such*, as opposed to the fact of *reasonable* pluralism; cf. Rawls 2005, 36. Law as pluralism makes no prima facie judgments concerning the reasonableness of fundamental commitments; reasonableness is not a criterion of adequacy.

Asians" or "men are inferior to women." The fact of pluralism expresses the incompatibility of fundamental commitments held by the members of a given population; the set of fundamental commitments held by that population is *inconsistent*. Conditions of conflicting fundamental commitments are thus conditions in which the set of fundamental commitments is inconsistent.

2.2 A normative conception of pluralism

The fact of pluralism is a descriptive fact about the world, independent of any value we may or may not attach to it. The fact of pluralism says nothing about whether pluralism is a good thing or a bad thing, or about how a population characterized by the fact of pluralism should be governed. In particular, the fact of pluralism says nothing about how legislation binding a population characterized by the fact of pluralism should be negotiated and adopted.

To answer these questions, we must develop a **conception of pluralism** that attaches value to the fact of pluralism, that gives us a foundation for determining how laws *ought* to bind the members of a population characterized by the fact of pluralism. The conception of pluralism we need is therefore *normative*, not merely descriptive like the fact of pluralism itself. Without such a normative conception of pluralism, we would be leaving the fact of pluralism to its own devices, so to speak: we would be agnostic about how a pluralistic society should regulate its affairs, whether the battle between conflicting fundamental commitments should be waged by means of war, coercion, law, or chance. Since this paper aims to define rules governing the negotiation and adoption of legislation which ensure that the legislation is adequate to a population's plurality of fundamental commitments, we are interested in a conception of pluralism that lends itself to a resolution of such conflicts by way of law, and in particular by way of legislation that is adequate to a population's plurality of fundamental commitments.

2.2.1 A conception of relativism?

As a starting point for approaching the definition of a conception of pluralism, we might consider first what a conception of *relativism* would entail:[76] a conception of relativism – or at least a conception of a maximalist

[76] On relevant distinctions between pluralism and relativism, see Kekes 1993, 31-34, and Connolly 2005, 38-49. Kekes 1993, 31, sums it up succinctly: "[R]elativists and pluralists disagree in their answers to the question of whether judgments of importance can be justified on context-independent grounds. Relativists deny this possibility, pluralists affirm it." This section develops the context-independent grounds under law as pluralism. Or as Rescher 1993, 103, defines pluralism: "Relativism is predicated on an indifferentism which maintains that whenever various bases of judgement, different evidential/evaluative standpoints or perspectives exist, then all these are (at least roughly) equally acceptable, so that there is no rationally cogent basis for choosing one rather than another." And Rescher 1993, 109: "The step from a mere *pluralism* to an actual *relativism* can be taken only via an indifferentism that there is really 'nothing to choose' between that plurality of distinct positions." This section develops the "rationally cogent basis" for choosing one position over another within the limited domain of lawmaking.

form of relativism – would be entirely agnostic with respect to the truth[77] of *all* the commitments held by all the members of a population. Under this maximalist conception of relativism, any of the commitments held by any member of the population could be considered true or at least potentially true, given the particular framework available to that member for determining the truth of her fundamental commitments. That framework would be specified by the member's particular upbringing, cultural belonging, personal convictions, and other contextual factors independent of the content of the commitment. Hence, the same commitment might be true in one framework and false in another. The conception of relativism would provide no criteria external to these contextual frameworks for assessing whether a given commitment is true or false; it would consider any commitment true or false only according to the particular framework of the person who holds the commitment.

If the conception of relativism were taken as the basis for defining rules governing the negotiation and adoption of legislation, the output of the legislative process would threaten to be inconsistent for the following reasons. The input to the legislative process would consist of a set of mutually incompatible fundamental commitments – commitments that could not be held simultaneously without a contradiction. Since there would be no criteria for rejecting any of these fundamental commitments as a basis for the laws generated by the legislative process, the laws generated would themselves be in danger of being inconsistent. For instance: the conception of relativism would be agnostic as to whether the commitment "women ought to wear veils in public" or the (incompatible) commitment "women ought not to wear veils in public" – both of which would serve as input to the legislative process – is true or false. A law that would be agnostic regarding the truth of these two commitments would therefore hold that "women ought to wear veils in public *and* women ought not to wear veils in public," if it tries to reflect both of these commitments simultaneously, or it would hold that "women ought to wear veils in public *or* women ought not to wear veils in public," if it tries to reflect each of these commitments without excluding the other. In either case, the outcome would be a lot of very confused veiled and unveiled women walking the streets.

The conception of relativism, taken as the basis for defining rules governing the negotiation and adoption of legislation, leads to legislative anarchy. One may argue whether this would be a good thing or bad thing, depending on one's fundamental commitments; but this paper's goal is to define rules governing the negotiation and adoption of *binding* and *enforceable* legislation, and it is difficult to see how any given law can be binding and enforceable if it is inconsistent.

Nevertheless, the conception of relativism has a feature that is appealing when considering the problem of how to define rules governing the negotiation and adoption of legislation that is to be binding on a population whose members hold a plurality of fundamental commitments: the conception of relativism does not exclude any fundamental commitments

[77] Conceptions of truth and validity will be discussed in more detail in the following subsection on "Achievability, truth, and validity"; for now, an informal notion of truth is assumed.

solely on the basis of their *content*. This is a feature we would like to import to the extent achievable into the conception of pluralism: if the conception of pluralism were to prejudge the truth of fundamental commitments before they have the opportunity to compete in the legislative process, the conception of pluralism would itself be fundamentally prejudiced, i.e., it would presuppose the truth of fundamental commitments beyond the commitment to pluralism. The exercise of this paper is to avoid such presuppositions.[78]

So the appealing feature of the conception of relativism for our purposes is that it gives every fundamental commitment the opportunity to compete in the legislative process – the problem is that under the conception of relativism, all fundamental commitments win. In practice, if legislation is to be consistent and binding and enforceable, some commitments must lose in the legislative process. The legislative process thus acts as a filter that separates out the losing commitments from the winning commitments, only the latter of which flow into the laws that are the output of the legislative process.

2.2.2 Achievability, truth, and validity

As defined in subsection 1.3.3 above, legislation is *adequate* to the plurality of fundamental commitments in a given population if it takes *all* fundamental commitments held by members of that population as equal input to the legislative process, *to the extent achievable*, and the output of the process reflects that input *to the extent achievable*. Under a conception of pluralism adequate to the plurality of fundamental commitments in a given population (i.e., adequate to the fundamental commitments of a population characterized by the fact of pluralism), the legislative process must give *all* fundamental commitments an equal chance to compete, regardless of their content – but it must then winnow out fundamental commitments in the attempt to generate laws as output that are consistent and enforceable.[79] This process of winnowing out commitments implements the qualification "to the extent achievable."

The difference between the conception of relativism and the conception of pluralism is therefore the qualification "to the extent achievable" attached to the latter, more specifically that the laws outputted by the legislative process under the conception of pluralism must be consistent and enforceable. This means that the legislative process treats all fundamental commitments equally *prima facie*, but it may disregard certain commitments in its quest to generate a consistent and enforceable output. While the conception of relativism treats all fundamental commitments equally *simpliciter*, the conception of pluralism treats all fundamental commitments equally only *prima facie*.

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[78] This is important especially in light of the third ground rule, namely agnosticism with regard to various political conceptions. See subsection 1.4.3 above.

[79] As we shall see below, the winnowing process involves two stages: one at the entry point to the legislative process (the justificatory constraint of law as pluralism discussed in chapter 4), and one at the exit point from the legislative process (the termination conditions discussed in section 6.7).

But what does this entail for the truth of the fundamental commitments? If the legislative process under the conception of pluralism accepts certain commitments as input and rejects others in its attempt to generate consistent and enforceable laws as output, isn't this tantamount to a judgment concerning the truth or falsity of the fundamental commitments, thus violating the third ground rule set out in subsection 1.4.3?

No. The legislative process under the conception of pluralism does not deal in truth. It deals in *achievability* or *workability*, given the constellation of fundamental commitments offered as input to the legislative process. The conception of pluralism is thus a *pragmatic* conception,[80] concerned with the workability of the output as opposed to the truth of the input.[81]

If the legislative process under the conception of pluralism does not make a judgment concerning the *truth* of the fundamental commitments offered as input to the legislative process, what aspect of those commitments *does* it make a judgment concerning? It makes a judgment concerning the ability of a commitment to contribute to the output of the legislative process, in light of the need for that output to be consistent and enforceable. In the following, we will call this ability the *validity* of the commitment:[82] a commitment is valid *relative to a legislative process* if the output of that process reflects the commitment, i.e., if the output is compatible with the commitment and can be derived from it. Conversely, a commitment is invalid *relative to a legislative*

[80] And, indeed, a *pragmatist* conception, if pragmatism as a philosophical method is understood as being more interested in what truth *does* than in what truth *is*. See Finlayson 2005, 328, comparing Brandom with Habermas: "Robert Brandom's semantic inferentialism – a combination of pragmatism, rationalism and logical expressivism – in which Habermas has taken a keen interest, sets out to replace the question of what truth 'is' by the question of what we do when we treat something as 'true'." Another way of understanding the pragmatist orientation of this paper is that the paper, and by extension law as pluralism, are more interested in *justification* than in *truth* – at least with regard to the restricted domain of lawmaking. Cf. Rorty 2000, 4: "There are many uses for the word 'true,' but the only one which could not be eliminated from our linguistic practice with relative ease is the cautionary use. That is the use we make of the word when we contrast justification and truth, and say that a belief may be justified but not true… We use it to remind ourselves that people in different circumstances – people facing future audiences – may not be able to justify the belief which we have triumphantly justified to all the audiences we have encountered [internal citation omitted]." Law as pluralism is interested in justifying commitments as the basis for laws that are binding and enforceable with respect to a pluralistic population; it is not interested in the truth of those commitments as such.

[81] Waldron 1999a, 111 n. 62, makes this point with respect to politics in general: "Although the idea of objective values is the idea of one view being right and the others wrong in a dispute about justice, it is an idea which has little utility in politics. As long as objective values fail to disclose themselves to us, in our consciences or from the skies, in ways that leave no room for further disagreement about their character, all we have on earth are *opinions* or *beliefs* about objective value. The friends of truth will insist stubbornly that there really is, still, a fact of the matter out there. Really. And maybe they are right. But it is surprising how little help this purely existential confidence is in dealing with our decision-problems in politics."

[82] "Validity" is not an unproblematic term: in logic, a statement is valid if it is true in all interpretations; the validity of a statement is generally the same as the logical truth of the statement. Moreover, the term "validity" has a somewhat different meaning in other political philosophies, notably in Habermas 2004, where it appears to subsume notions of (theoretical) "truth" and of (moral) "rightness"; see Finlayson 2005. Nevertheless, the definition of validity used in this paper bears useful and relevant similarities to these other definitions in that it is a *pragmatic* conception rather than a *metaphysical* conception.

process if the output of that process does not reflect the commitment, i.e., if the output is incompatible with the commitment and cannot be derived from it.

This gives us a succinct way of defining the following normative **conception of pluralism** under law as pluralism:

> Under law as pluralism, prima facie equal validity ought to be accorded to all fundamental commitments offered as input to the legislative process, even where such commitments are incompatible with each other.

As we have seen, however, this conception is only *prima facie*: the legislative output under the conception of pluralism reflects only those fundamental commitments that do not lead to an inconsistent or unenforceable output. Fundamental commitments reflected in the legislative output are *actually* valid relative to the legislative process, while fundamental commitments not reflected in the legislative output are only *prima facie* valid relative to the legislative process, but not actually.

Nothing said so far indicates the criteria by which the actual validity or invalidity of specific fundamental commitments is determined relative to a legislative process; it is also not clear whether, given a certain set of fundamental commitments, only one consistent and enforceable legislative output is possible, or whether several distinct (and even mutually incompatible) outputs may be possible, each of which may or may not reflect a different set of fundamental commitments. These issues will be discussed in subsequent chapters; but first, we must consider what a commitment to this normative conception of pluralism entails. In the following, the unmodified term "pluralism" is meant to be read as "the normative conception of pluralism" outlined in this section. Where the (descriptive) fact of pluralism is intended, the full phrase "fact of pluralism" will be used. Similarly, "legislative process under the normative conception of pluralism" will now be referred to as "pluralistic legislative process" or simply "legislative process," where the reference to the conception of pluralism is clear.

2.3 Committing to pluralism

2.3.1 Everyone's a little bit racist

(This normative conception of) pluralism is hard to commit to. Since pluralism accords prima facie validity to all fundamental commitments offered as input to the legislative process, it implies that any of our fundamental commitments – even those referring to our most deeply held beliefs and values – may end up being irrelevant to the laws actually adopted: fundamental commitments incompatible with mine may end up being deemed valid by the legislative process, while my own fundamental commitments may end up being deemed invalid – i.e., they may end up not being reflected by the laws outputted by the legislative process. But while the pluralistic legislative process winnows down the fundamental commitments that are ultimately reflected in the legislative output, the legislative process refuses to certify the *truth* of our commitments or the falsity of others'

commitments. Instead, the legislative process limits itself to determining the *validity* of such commitments with respect to that specific legislative process.[83] So even though I may, in some extra-legislative or metaphysical sense, be *right*, I may end up being *bypassed*.

Since the pluralistic legislative process is agnostic with respect to the truth of fundamental commitments (other than the commitment to pluralism), it implies that forcing our beliefs and values down everyone else's throats *as part of the legislative process* is not an appropriate or effective way to coordinate social action, even if we're absolutely convinced we're right about those commitments. A commitment to pluralism implies taking a step back from our desire to change other people through legislation and make them more like us.[84]

Committing to pluralism is especially hard given that "everyone's a little bit racist"[85] or at least discriminatory: whether because of our genes, culture, upbringing, education, religion, ideology, peer group, evolutionary history, or our fundamental commitments regardless of their origin, we have the tendency to treat people who are different from us with skepticism, distrust, or disgust – whether on the basis of their "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"[86] including their preferences, practices, and orientation relating to food, hygiene, dress, music, living arrangements, work, leisure activities, and perhaps most especially sexuality, and more specifically on the basis of their fundamental commitments that conflict with ours. Embracing or even just tolerating people who are unlike us does not always come naturally; neither does embracing or even just tolerating their fundamental commitments.

When presented with the opportunity to control people's behavior and to make them more like us, it is tempting to seize it. When this opportunity is afforded through the exercise of legislative power, i.e., the ability to control people's behavior through binding, enforceable, legally sanctioned norms, the temptation may be even harder to resist.

The commitment to pluralism reins in this temptation. Precisely because discrimination and the desire to ram our fundamental commitments down other people's throats is so tempting and so universal, the ability to effectively

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[83] Ensuring the *integrity* of the legislative output of a legislature complicates this picture somewhat, since it requires looking at the validity of commitments across several distinct legislative processes leading to distinct legislative outputs, as opposed to just a single specific legislative process leading to single legislative output. This complication will be discussed in more detail in section 7.1 on "Making justifications explicit" below.

[84] A commitment to pluralism in the restricted sense developed here does not entail refusing to change other people *at all*; it merely excludes such aims from the legislative process, but leaves anyone free to pursue them outside the legislative process – e.g., in other forums in the public sphere. Appiah 2006, 72, expresses general skepticism about the ability to change minds through arguments, rather than through practice: "I don't say that we can't change minds, but the reasons we exchange in our conversations will seldom do much to persuade others who do not share our fundamental evaluative judgments already." If this is true of conversations in general, it is certainly true of conversations within the context of the legislative process.

[85] See Lopez and Marx 2002.

[86] Article 2(1) of the *International Covenant on Civil and Political Rights* and article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*.

coordinate collective action through legislation in a society characterized by the fact of pluralism depends on the restraint afforded by the commitment to pluralism. The commitment to pluralism acknowledges that others hold commitments that may conflict with the commitments we hold, and that we need to make room for those conflicting commitments in the legislative process even though we otherwise may prefer not to.[87] The commitment to pluralism balances out our innate or acculturated desire to make others conform to our beliefs, values and lifestyle choices. The commitment to pluralism means that, at least when it comes to the negotiation and adoption of legislation, we commit ourselves – at least prima facie – to taking a step back from our desire to force others to be like us. In a theoretically pure, homogeneous society with a high degree of conformity of fundamental commitments, perhaps no commitment to pluralism would be necessary.[88] But in a society characterized by the fact of pluralism, the negotiation and adoption of legislation depends on a commitment to pluralism that keeps our discriminatory impulses in check.[89]

2.3.2 Qualifying motives

The desire to control other people's behavior through legislation is not always, however, motivated by racism or a similar desire to discriminate, or by some other emotionally overwhelming and perhaps irrational urge to make people conform to our fundamental commitments. There are at least four ostensibly justifiable motives why we may want to use legislation to control other people's behavior:

1. we believe we are doing them a favor (the "missionary" motive);
2. we are afraid that they may beat us to it and impose their own fundamental commitments on us (the motive from fear);
3. by binding everyone, we bind ourselves, knowing that without external constraints, we may lapse into behavior we find objectionable or dangerous (the "precommitment" motive);[90] and

[87] As Connolly 2005, 3, puts it in reference to a Marxist friend of the family whom he respected but with whom he disagreed: "I wanted Charlie to have a voice in the world, not to be its Voice." The commitment to pluralism gives people with conflicting commitments a voice, without making any one of them the Voice.

[88] Although the lack of such a commitment to pluralism would likely bar the development of a diversity of beliefs and values within society that makes social change possible in the first place. But it is of course a question of one's fundamental commitments whether such change is desirable.

[89] According to Rorty 1999, 237, this is *all* that is required under pluralism (which Rorty situates squarely within his minimalist conception of the liberal tradition): "It seems to me that the only homogenization which the liberal tradition requires is an agreement among groups to cooperate with one another in support of institutions which are dedicated to providing room for as much pluralism as possible." Connolly 2005, 41, puts a more militant spin on this: "A pluralist… is one who prizes cultural diversity along several dimensions and is ready to join others in militant action, when necessary, to support pluralism against counterdrives to unitarianism." The commitment to pluralism is thus stronger than mere *toleration*; it is an affirmative duty to combat and exclude commitments that undermine pluralism.

[90] A motive discussed paradigmatically by Elster 1984 and partially critiqued and refined by Elster 2000. See also Stephen Holmes 1988 and 1997 for a discussion of its application to democracy, and Waldron 1999a, 255-281, for a critique of precommitment as a justification for judicial review.

4. we believe the fundamental commitments held by others are so noxious to a pluralistic society that we feel we must curtail them by law (the "defense-of-pluralism" motive).[91]

In the following, these four motives will be referred to as *qualifying motives*.

Each of these qualifying motives is in tension with the commitment to pluralism:

1. The missionary motive devalues the fundamental commitments of others, in that we believe that such commitments are hazardous to those who hold them and that we are justified in using legislation to ensure that the harm arising from such commitments is limited or eliminated. An example would be advocacy of legislation prohibiting "victimless" acts such as private narcotic drug use, suicide, and certain sexual practices.
2. The motive from fear assumes that while we may be committed to pluralism, others may not be committed to pluralism; hence, we are justified in curtailing the fundamental commitments of others as a form of preemptive self-defense. An example would be advocacy of legislation prohibiting the wearing of burqas in public, motivated by the fear that otherwise, we might one day be forced to wear burqas ourselves.
3. The precommitment motive privileges our desire to control our own behavior, and as a side-effect the behavior of others, over our commitment to pluralism. An example would be advocacy of legislation making it harder for us (and hence others) to divorce or become over-indebted. And
4. the defense-of-pluralism motive suspends the commitment to pluralism where pluralism itself is at risk. An example would be advocacy of legislation prohibiting Holocaust denial, thereby making it a crime to express fundamental commitments that deny the fundamental commitments of others; another example would be advocacy of legislation prohibiting female genital mutilation/cutting, in the belief that such practices are imposed on women against their own fundamental commitments.[92]

How do the qualifying motives impact the commitment to pluralism? To answer this, we must look at how a commitment to pluralism links up with the content of other commitments. How can an individual (and in particular an individual legislator) reconcile her commitment to pluralism with any other fundamental commitments that person (or legislator) might hold? It should be clear from the preceding discussion that the commitment to pluralism is in fact a *fundamental* commitment: it says something substantial

[91] Akin to Connolly's "militant" pluralism, see n. 89 above.
[92] To the extent such practices do *not* conflict with the fundamental commitments of the women undergoing them, advocacy of a ban would fall under the missionary motive. The distinction is complicated by the fact that the women undergoing such procedures are generally minors, so that determination of their fundamental commitments may be subject to counterfactuals (such as what their fundamental commitments *would* be when they're older and it's too late to undo what has been done).

about the ultimate beliefs and convictions of a person who holds it.[93] For someone sincerely committed to pluralism, it is non-negotiable in the sense that it will not be traded in or abandoned without a fight. As a fundamental commitment, the commitment to pluralism may very well conflict with other fundamental commitments one holds. Most fundamental commitments do not have a commitment to pluralism "built in," and hence the conclusions one reaches on the basis of one's fundamental commitments alone (without the commitment to pluralism) may be very different from the conclusions one reaches on the basis of one's commitment to pluralism in conjunction with one's other fundamental commitments.

For instance, let's say I believe: (a) that veils are a sign of discrimination against women; (b) that discrimination against women should be prohibited by law; and hence (c) that the wearing of veils should be prohibited by law. Without regard to my commitment to pluralism, these commitments taken together – let's call them my *non-pluralistic commitments* – lead me to take a legislative position in favor of prohibiting the wearing of veils.

Adding a commitment to pluralism – without qualifying motives – to these non-pluralistic commitments complicates matters in several ways: in addition to causing me to abandon any attempt to change other people's fundamental commitments by means of the legislative process, such a commitment to pluralism may (a) cause me to call into question my commitment that veils really are a sign of discrimination against women, since I acknowledge that the contrary belief, namely that veils are not or are not always a sign of discrimination against women, *may* be true; (b) conflict with my commitment that discrimination against women should be prohibited by law, since the contrary commitment, namely that discrimination against women should not or should not always be prohibited by law, *may* be true; and (c) conflict with my commitment that the wearing of veils should be prohibited by law, since that commitment depends on my commitment that veils are a sign of discrimination against women, which may not be true, and since it conflicts with the commitment that prohibition against women should not or should not always be prohibited by law, which may be true. Taking my commitment to pluralism into account along with my other, non-pluralistic commitments, I may end up taking a legislative position in favor of *not* prohibiting the wearing of veils, contrary to the legislative position I would take according to my non-pluralistic commitments alone. Or I may just end up being hopelessly confused and unable to take any position at all.

Qualifying my commitment to pluralism with any of the qualifying motives gives us an entirely different picture: the missionary motive may cause me to believe that prohibiting the wearing of a veil is for a woman's own good, even if she may voluntarily opt to wear one; the motive from fear may cause me to want to prohibit the wearing of veils so that the permission to wear a veil never slides down the slippery slope toward an obligation to wear a veil; the precommitment motive may cause me to advocate legislation prohibiting the wearing of veils so that I am never tempted to wear one myself (or cause my

[93] If the commitment to pluralism is embedded in the rules that constrain the legislative process, as opposed to being left to the individual (legislator), then the commitment to pluralism is held by those who design and agree to the constraints on the legislative process, but not necessarily by those who work within those constraints.

family members to wear one); and finally, the defense-of-pluralism motive may cause me to want to prohibit the wearing of veils because I believe that legislation condoning the wearing of veils suppresses the fundamental commitments of women coerced or cajoled by their family members or peers into wearing one.

Honoring a commitment to pluralism without qualifying motives threatens to eviscerate an individual legislator's ability to take any legislative position that would lead to a law in conflict with the fundamental commitments of anyone else. If a legislator did take such a position during negotiations, and hence before the legislative process had run its course, the legislator would be denying prima facie validity to the fundamental commitments held (or represented) by other legislators, thus violating the legislator's commitment to pluralism. The only criterion consistent with the commitment to pluralism for denying the validity of another legislator's commitments would be if those other legislator's commitments led to an inconsistent legislative output; but the same criterion would then also apply to the legislator's own commitments if those commitments contributed to the inconsistency. Hence, a legislator committed to pluralism without qualifying motives would have to refrain from taking any positions that could lead to inconsistent legislation, given the positions held by others. If all legislators did this, no controversial positions would be taken during legislative negotiations at all, and hence only trivial legislation, if any, would be outputted by the legislative process.

Conversely, holding a commitment to pluralism in conjunction with qualifying motives threatens to render the commitment to pluralism ineffective and superfluous: the qualifying motives could be used by an individual (legislator) to justify nearly any legislative position taken. The missionary motive could be used to justify slavery, the motive from fear could be used to justify genocide, the precommitment motive could be used to justify the establishment of a theocracy, and the defense-of-pluralism commitment could be used to justify the suppression of all antagonistic speech, none of which appear consistent with the normative conception of pluralism.

Depending on whether a legislator's commitment to pluralism is supplemented by qualifying motives, either the commitment to pluralism threatens to lead to legislative paralysis, i.e., the inability to take any controversial positions during legislative negotiations, or the commitment to pluralism threatens to be inoperative.

2.3.3 Perspectival, comprehensive, and deep pluralism

Nicholas Rescher, Michel Rosenfeld and William Connolly have developed different but complementary ways to analyze and address this tension between the commitment to pluralism and other fundamental commitments, including the qualifying motives. According to Rescher,

> It is, in the eyes of some, a disadvantage of pluralism that it supposedly undermines one's commitment to one's own position. But this is simply fallacious. There is no good reason why a recognition that others,

> circumstanced as they are, are rationally entitled *in their circumstances* to hold a position at variance with ours should be construed to mean that we, *circumstanced as we are*, need feel any rational obligation to abandon our position.[94]

Rescher calls this "perspectival pluralism"[95] or "pluralism without indifferentism,"[96] which recognizes the different experiential and cognitive contexts in which different people develop their conflicting commitments, while holding fast to one's own. He expressly disavows the notion that a commitment to pluralism leads to inaction or paralysis when combined with other commitments:

> An experiential pluralism of cognitive orientations is thus no impediment to doctrinal commitment. There is no reason that the mere existence of different views and positions should leave us immobilized like the ass of Buridan between the alternatives. Nor are we left with the grey emptiness of egalitarianism that looks to all sides with neutrality and uncommitted indifference. […] An acknowledgement of pluralism is no invitation to abandoning one's dedication to one's own position.[97]

Rescher claims that we (and by extension, legislators) accomplish this feat by distinguishing internal from external perspectives:

> [O]ne must distinguish between the standpoint of the individual and the standpoint of the group. Pluralistic diversity of opinion is a feature of the collective whole: it turns on the fact that different experiences engender different views. But from the standpoint of the individual this cuts no ice. We ourselves have to alternative to proceeding on the basis of what is available to us here and now. Granted, the group as a whole incorporates other alternatives, many or most of them incompatible with one's own. But the fact that the wider community as a whole contains other positions does nothing to render a firm and fervent commitment to one's own position somehow infeasible, let alone improper. We cannot rationally maintain a posture of indifference.[98]

As rational creatures, we can never abandon our internal perspective on what is true and what is right; but as social creatures, we cannot disregard the fact that others with whom we must cooperate may have different internal perspectives, given their own experiences and cognitive orientations. The desire to cooperate requires that we take an external perspective alongside our internal perspective – thus engendering a tension that can never be fully resolved, but must be partially resolved in order to engage in joint projects with others.

Rosenfeld formalizes these two distinct perspectives within the context of legal interpretation by developing a normative conception of "comprehensive" pluralism which acknowledges other commitments, but trumps them in the interest of its own survival:

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[94] Rescher 1993, 119-120.
[95] Rescher 1993, 121.
[96] The theme of Rescher 1993, 98-126, which distinguishes indifferentist relativism from pluralism without indifferentism.
[97] Rescher 1993, 121-122.
[98] Rescher 1993, 120.

> [T]he aim of comprehensive pluralism is to encompass, and to foster peaceful coexistence among, as many competing conceptions of the good as possible. Moreover, comprehensive pluralism must be prepared to accept the norms produced by other conceptions of the good, but only to the extent that such norms do not interfere with its encompassing design.[99]

This normative conception of comprehensive pluralism distinguishes first-order norms from second-order norms analogous to Rescher's internal and external perspectives:

> [T]he normative apparatus associated with comprehensive pluralism's integrating mission can be conceived as consisting of second-order norms that are distinguishable from first-order norms – that is, all the other norms associated with one or more of the remaining conceptions of the good. In short, comprehensive pluralism's principal aim is to negotiate the tension between first-order and second-order norms without thereby compromising the latter, all the while remaining as inclusive as possible with respect to the former.[100]

The last sentence puts a useful gloss on what is intended by the goal of law as pluralism to achieve adequacy to conflicting fundamental commitments *to the extent achievable*: while law as pluralism is as inclusive as possible with respect to (potentially conflicting, first-order) fundamental commitments, it disregards them to the extent they cannot (in some, yet-to-be-determined way) be reconciled with each other and especially where they would compromise the (second-order) commitment to pluralism. And that second-order commitment to pluralism, while a normative conception of the good itself, exists only for the purpose of reconciling the tensions among the first-order commitments.[101] This helps sharpen the distinction between the normative conception of pluralism we have developed and the conception of relativism we are trying to avoid:

> [C]omprehensive pluralism figures, in part, as a conception of the good that claims superiority over its rivals, but only for the limited purpose of minimizing exclusion of other conceptions of the good. Conversely, comprehensive pluralism's systematic leveling of conceptions of the good

[99] Rosenfeld 1999, 200.
[100] Rosenfeld 1999, 201.
[101] Gutmann and Thompson 1996, 93, explain this relationship between first-order commitments and second-order commitments as follows, in relation to public deliberation: "The aim of such a process [of public deliberation] is not necessarily to induce citizens to change their first-order moral beliefs. It is rather to encourage them to discover what aspects of those beliefs could be accepted as principles and politics by other citizens with whom they fundamentally disagree. Since it is this second-order agreement that citizens should seek, they do not have to trade off their personal moral views against public values. Deliberative reasoning is not correctly represented if it is described as giving more weight to the value of mutual respect or deliberation than (for example) to the sanctity of life. A citizen may still believe that the sanctity of life is more important, but recognize that under current conditions her understanding of the value is not yet sufficiently appreciated by her fellow citizens and therefore cannot yet become the basis of public policy that is justified from a reciprocal perspective." Audi 2000, 135, even claims that this second-order commitment is more-or-less universal: "A major second-order moral obligation that we all seem to have is to take (first-order) moral obligations and principles seriously and to seek accommodation with those with whom we are obligated to live in peace despite our disagreements, whether they are outside our own religious tradition or within it."

> does introduce some measure of relativism, but it is a limited and narrowly targeted one, whose only aim is to undermine the pretensions to superiority of certain conceptions of the good. Strictly speaking, therefore, comprehensive pluralism is not relativistic as between conceptions of the good: it is merely skeptical concerning any claim to a hierarchy between them.[102]

Succinctly put: "[P]rivileging comprehensive pluralism over other conceptions of the good boils down to affording second-order norms priority over first-order norms since that is a prerequisite to achieving equality among first-order norms."[103]

Rosenfeld is primarily interested in legal *interpretation* as opposed to lawmaking. But this distinction between first-order commitments and second-order commitments, and the resulting conception of pluralism he develops, might be applied to legislators engaged in the legislative process as well. The legislator's commitments would then be parceled into two distinct domains: the legislator's first-order fundamental commitments, grouped more or less coherently together into the legislator's overall worldview (or the worldviews the legislator represents), which the legislator would use as the basis for positions taken during legislative negotiations; and the legislator's second-order commitment to pluralism, which would be manifested in the legislator's commitment to the pluralistic legislative process. Although it may happen that the legislator's first-order commitments might come to be modified by her second-order commitment to pluralism (and the second-order commitment to pluralism might in fact come to be integrated coherently into the legislator's set of first-order commitments, forming part of a more comprehensive worldview), the legislator's first-order commitments and her second-order commitment to pluralism need not be compatible with each other – i.e., the conclusions a legislator reaches on the basis of her non-pluralistic commitments alone need not be compatible with the conclusions the legislator reaches on the basis of her non-pluralistic commitments in conjunction with her commitment to the pluralistic legislative process.

But this, of course, requires considerable cognitive agility on the part of the legislator. Maintaining a commitment to perspectival pluralism or comprehensive pluralism, even as a regulative ideal, requires a "bicameral orientation to political life," as expounded by William Connolly in his related development of a "public ethos" of "deep pluralism:"[104]

> [A] bicameral orientation to political life does mean that you keep a foot in two worlds, straddling two or more perspectives to maintain tension between them. A bicameral orientation requires a tolerance of ambiguity in politics, the sort of tolerance that Theodor Adorno in his classic study says is lacking in 'the authoritarian personality.' [internal citation omitted]"[105]

But it is precisely the fact that everyone, including legislators, has a "bit of an authoritarian personality," or at least a commitment to certain qualifying motives, that makes it so difficult to implement this bicameral orientation. As

[102] Rosenfeld 1999, 208.
[103] Rosenfeld 1999, 209.
[104] Connolly 2005, 65.
[105] Connolly 2005, 4.

Connolly puts it, "The bicameral orientation to citizenship requires a fair amount of self-cultivation and inter-consistency negotiation to fuel and sustain itself."[106] It requires a constant calling-into-question of one's own first-order commitments, in light of the pressure of conflicting first-order commitments one is forced to consider in light of one's second-order commitment to pluralism: "It is comparable to the double consciousness attained when people correct their perceptual sense that the sun rotates around the earth with second-order knowledge that the reality is the other way around."[107] As Galileo and the Holy See would confirm, achieving this double consciousness is a tedious and time-consuming process.[108] The fact that fundamental commitments are *fundamental* makes this process all the more demanding:

> Installation of a bicameral orientation to the relational dimension of your own faith is never entirely attained. When you pursue such a program, old flames of anathematization will periodically flare up again, and new and unexpected movements of faith by others will arise to pose the issue all over again in surprising terms. Such a double perspective is fostered by religious work, individual and collective. It juxtaposes exercises of the self to a positive version of the micropolitics by which we regularly work on each other. That is, it involves the essence of ethico-political life in a pluralistic society.[109]

Installing this bicameral orientation – or a commitment to comprehensive pluralism, or a perspectival approach to one's own fundamental commitments and those of others – in micropolitics is a tall order, let alone in the macropolitics of lawmaking. Too tall, perhaps: a commitment to a bicameral orientation does not always make it easier to get (re-)elected, and even where nobly and self-sacrificially pursued, it may easily slide into a degenerate (and relativistic) form of tolerance that is an easy target for those not so committed. But Rescher, Rosenfeld, and Connolly are not specifically concerned with lawmaking: while Rosenfeld focuses on legal interpretation (paradigmatically by courts and lawyers), Rescher and Connolly are concerned with political culture, the social order, and by extension the entire public sphere. When applied to the legislative process – which, in comparison with the public sphere at large, has algorithmic aspects that can be formally defined and enforced – we would like to implement a conception of pluralism that captures the bicameral, dual-order approach of this trinity of perspectival/comprehensive/deep pluralism, but with fewer cognitive demands, less voluntarism, and more teeth.

2.3.4 Embedding the commitment to pluralism in rules

How can this be done? By absolving the individual legislator of the responsibility to directly reconcile her non-pluralistic commitments with the commitment to pluralism. In other words, by committing the *legislature* to

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[106] Connolly 2005, 5.
[107] Connolly 2005, 32.
[108] 359 years, to be exact: "Moving formally to rectify a wrong, Pope John Paul II acknowledged in a speech today that the Roman Catholic Church had erred in condemning Galileo 359 years ago for asserting that the Earth revolves around the Sun." See "Vatican Science Panel Told By Pope: Galileo Was Right" 1992.
[109] Connolly 2005, 33.

pluralism, rather than the individual legislator, by embedding the commitment to pluralism in the rules that constrain the legislative process.

The cognitive dilemma outlined above is one argument in favor of this approach: if the rules constraining the legislative process take adequate account of the commitment to pluralism, and hence the legislative process itself is committed to pluralism, individual legislators may be relieved of the need to reconcile their non-pluralistic commitments with the commitment to pluralism. This would enable legislators to advance their original legislative stances without regard to the commitment to pluralism – e.g. that the wearing of veils should be prohibited by law – and trust that the legislative process itself will take adequate account of the commitment to pluralism. Since the pluralistic process only takes account of all input commitments *to the extent achievable* when generating legislative output, an individual legislator can trust that any legislative position, including her own, may be taken during negotiations, but it may not be reflected in the legislative output actually adopted.

As will be argued later on, this does not entail that the *justifications* offered by legislators for their legislative positions during negotiations are without constraint. Quite the contrary: the freedom of legislators to take positions without first reconciling their non-pluralistic commitments with the commitment to pluralism is purchased at the cost of constraints on the reasons they may employ to justify their positions taken.

If a commitment to pluralism is embedded in the rules that constrain the legislative process, then the individual legislator's commitment to pluralism would be manifested in the legislator's participation in a legislative process committed to pluralism. Beyond that, the legislator would be free to advocate any position during legislative negotiations that the legislator sees fit, subject to the justificatory constraints suggested in the preceding paragraph and developed in more detail below. With respect to specific positions taken during specific negotiations, the legislator would not be bound directly by the commitment to pluralism per se – only indirectly by way of the commitment to the pluralistic legislative process as embedded in the rules she is subject to as a legislator. The legislator's first-order commitments and second-order commitment to pluralism would coexist in two cognitively *and procedurally* separate domains as part of Connolly's bicameral structure of commitments: on the one side, the legislator's non-pluralistic commitments would determine the positions the legislator takes in legislative negotiations; on the other side, the legislator's commitment to pluralism would be realized by her compliance with the rules that constrain the legislative process.

In particular, the legislator's qualifying motives would be treated the same way as any other commitments offered as a justification for legislative positions and proposals: they would be treated equally prima facie, but they might be disregarded in the end, just like any other commitment, in order to ensure that the legislation is adequate and enforceable. Subject to the justificatory constraints, the legislator would be free to offer any qualifying motive as a justification for a position taken or a proposal tabled during legislative negotiations. Qualifying motives offered as justifications would be

taken into account to the extent achievable, and they would be winnowed out during the legislative process.

Without going into detail at this stage, it is clear that some qualifying motives might survive the pluralistic legislative process more readily than others, if the commitment to pluralism is itself embedded in the rules that constrain the legislative process. The requirement of adequacy to *all* fundamental commitments, to the extent achievable, goes some way toward assuring those motivated by fear or the desire to defend pluralism: although commitments incompatible with mine will be reflected by legislation to the extent achievable, so will my own commitments. To the extent there is agreement in a given legislative jurisdiction that precommitment is a good thing, for whatever reason, there is nothing about the commitment to pluralism that undermines the precommitment motive *in that jurisdiction* – although it may gut the precommitment motive in other jurisdictions.[110] The missionary motive is the least likely class of commitment to survive the pluralistic legislative process: since the missionary motive explicitly devalues the fundamental commitments of others, and is thus explicitly incompatible with the commitment to pluralism, it is only likely to be reflected by legislation under law as pluralism if it can be offered as input to the legislative process as a different class of commitment.[111]

Assuming that the commitment to pluralism is embedded in the rules that constrain the legislative process, rather than left to individual discretion, how can it be enforced with respect to individual legislators? In other words, how can it be ensured that the commitment to pluralism is actually a *commitment* as opposed to a *regulative ideal*, i.e., a desirable form of conduct that may be deviated from when trumped by actual commitments or contingencies? This will be discussed in more detail below in chapter 7 on "Implementing law as pluralism." The short answer for now is: by joining a legislature, a legislator commits herself to pluralism as embedded in the rules that constrain the legislative process, in the same way that the legislator commits herself to the other requirements of the job. Commitment to the pluralistic legislative process is a permanent criterion for membership in a pluralistic legislature and for the exercise of the rights and privileges attached to such membership. Positions taken in legislative negotiations – or more precisely, as will be discussed below, *justifications* of positions taken in legislative negotiations – that violate the rules embedding the commitment to pluralism are subject to sanction or invalidation by those rules, as well as by the constitutional mechanisms that determine the validity of legislation.

By embedding the commitment to pluralism in the rules that constrain the legislative process, the difficulty of committing to pluralism discussed in the preceding subsections is reduced to the difficulty of designing a legislative process that is committed to pluralism. This will be done below in the form of constraints on legislative justification: both constraints on the justifications

[110] The level-specific nature of the validity of commitments (and hence of precommitments) will be analyzed in detail in chapter 6 on "Recursive pluralism" below.

[111] For instance, a commitment to prohibiting private narcotic drug use may turn out to be invalid if introduced in terms of the missionary motive; but it may turn out to be valid if introduced in terms of the precommitment motive or the motive from fear. These considerations will be developed in more detail in chapter 4 on "The justificatory constraint of law as pluralism" below.

available to individual legislators negotiating within a legislature, and constraints on the justifications available to the legislature itself acting as a collective body. The core of this project is the "justificatory constraint of law as pluralism" developed in chapter 4 below. But to do so, different types of "commitment" must first be classified, by means of the following three distinctions: the distinction between fundamental and subsidiary commitments, the distinction between popular and legislative commitments, and the distinction between descriptive and prescriptive commitments. These classifications will be the subject of the following chapter.

3 Classifying commitments

3.1 Fundamental and subsidiary commitments

The normative goal of this paper is to define rules for the negotiation and adoption of laws so that, in each legislative jurisdiction, the laws are adequate to the potentially conflicting fundamental commitments of the members of the population in that legislative jurisdiction.

The Introduction provided a brief definition of **fundamental commitments**: fundamental commitments are the bedrock, non-negotiable beliefs, values, convictions, revelations, intuitions, and so on, that a given person or group of persons holds in relation to the way the world is and the way it ought to be. This section will flesh out this definition and show what role fundamental commitments may serve in the process of justification.

In this paper, a person *holds* a commitment if that person has *undertaken* a commitment, i.e., the commitment can properly be *attributed* to that person. A person *endorses* a commitment if that person holds a commitment and *acknowledges* that commitment; this means that a person may hold a commitment without endorsing it, i.e., the person may have undertaken a commitment without being aware of it or without admitting it.[112]

Symbolically, this will be represented as follows:

H (X, C) means that a person X *holds* a commitment C, i.e., has *undertaken* that commitment.[113]

Where the context is clear, i.e., where it is clear (or irrelevant) that X is doing the holding, then H (X, C) will be abbreviated simply as C. Furthermore,

E (X, C) means that a person X *endorses* or *has endorsed* a commitment C.[114]

A fundamental commitment may ground further, *subsidiary* commitments by providing a reason for them; i.e., fundamental commitments may serve as *premises* for subsidiary commitments. Fundamental commitments may do so

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[112] This terminology largely follows Brandom 1994 and Brandom 2000a; but Brandom does not use the phrase "to hold a commitment" as a shortcut for "to have undertaken a commitment." On the difference between *undertaking* and *acknowledging*, see Wanderer 2008, 42-43: "Crucially, *undertaking* a commitment differs from such acknowledgement. In attributing a score [i.e., the status of being committed] to oneself, one attributes those commitments that one acknowledges. In undertaking a commitment, one adds to one's score both the commitment itself and those commitments that are its committive consequences. It is possible (and likely) that one will not acknowledge all such consequences even though one should. In undertaking a commitment, unlike in *acknowledging* a commitment, one is binding oneself beyond that which one currently recognizes as the committive consequences of the undertaking."

[113] The H ("holds") notation is equivalent to the B notation in doxastic logic, in which B stands for "believes." This paper follows Brandom's terminology and uses "believes" only informally as a less precise shortcut for "has undertaken (i.e., holds) the doxastic commitment that."

[114] E (X, C) is a shortcut for H (X, C) & H (X, H (X, C)): X endorses a commitment C if X has undertaken C (i.e., X holds C), and X holds that X has undertaken C (i.e., X acknowledges C).

in two ways:[115] by *committing* the person to a subsidiary commitment (committive inference), or by *entitling* the person to a subsidiary commitment (permissive inference).[116] A person is *committed* to a subsidiary commitment if the fundamental commitment entails the subsidiary commitment, i.e., anyone committed to the fundamental commitment *must* also be committed to the subsidiary commitment. A person is *entitled* to a subsidiary commitment if the subsidiary commitment is not ruled out by the fundamental commitment, i.e., anyone committed to the fundamental commitment *may* also be committed to the subsidiary commitment.[117] In either case, the subsidiary commitment is a *conclusion* of the fundamental commitment. These subsidiary commitments may in turn ground further (subsidiary) commitments through committive and permissive inferences.

Two commitments are *incompatible* with each other if one commitment precludes entitlement to the other.[118] A person is therefore entitled to a subsidiary commitment if the fundamental commitment does not entail a commitment that is incompatible with the subsidiary commitment. The negation of a commitment is always incompatible with that commitment, hence a person holding a given commitment is not entitled to hold the negation of that commitment.

In this paper, the following symbolic notation will be used:

$C_1 \rightarrow C_2$ means that someone holding the commitment C_1 is also *committed* to holding C_2 (committive inference);

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[115] There is also (at least) a third way, which is however not relevant to the analysis in this paper: in addition to the *committive* (commitment-preserving) and *permissive* (entitlement-preserving) inferences identified by Brandom, there are also *incompatibility* entailments. See Brandom 2000a, 194.

[116] Note that we are talking about *material* inferences, not *formal* inferences. See Brandom 1994, 97-105, and Sellars 1953. This tracks Brandom's *expressivist* conception of logic, as discussed above on p. 26 and in n. 67, and is appropriate to the nature of legislative justification, which does not follow formal rules of inference. Brandom 1994, 97-98, provides examples of material inference: "[C]onsider the inference from 'Pittsburgh is to the West of Philadelphia' to 'Philadelphia is to the East of Pittsburgh,' the inference from 'Today is Wednesday' to 'Tomorrow will be Thursday,' and that from 'Lightning is seen now' to 'Thunder will be heard soon.' It is the contents of the concepts *West* and *East* that make the first a good inference, the contents of the concepts *Wednesday, Thursday, today,* and *tomorrow* that make the second inference correct, and the contents of the concepts *lightning* and *thunder*, as well as the temporal concepts, that underwrite the third. Endorsing these inferences is part of grasping or mastering those concepts, quite apart from any specifically logical competence."

[117] This is an informal way of defining entitlement; according to Brandom 1994, 160: "It does make sense to think of being committed to do something as not being entitled not to do it, but within the order of explanation pursued here, it would be a fundamental mistake to try to exploit this relation to define one deontic status in terms of the other. Doing so requires taking a formal notion of negation for granted. The strategy employed here is rather to use the relation between commitment and entitlement (which are not defined in terms of this relation) to get a grip on a *material* notion of negation, or better, incompatibility." Brandom refers to *commitments* and *entitlements* to commitments as *deontic statuses*; *attributing* and *acknowledging* these deontic statuses are what Brandom calls *deontic attitudes*. See Brandom 1994, 648-650. Note that in practice, and especially in the *legislative* practice of interest here, it only makes sense to speak of *entitlement* if the conclusion bears some *substantive* relation to the premise; while a commitment to the claim that grass is green in some sense entitles one to the claim that snow is white, the type of *material* inference we are interested in here is where the commitment "the grass is green" entitles one to the commitment "the grass is still alive."

[118] See Brandom 1994, 160, and Brandom 2000a, 194.

$C_3 \succ C_4$ means that someone holding the commitment C_3 is *entitled* to hold C_4 (permissive inference);

C_5 / C_6 means that C_5 is *incompatible* with C_6 (i.e., someone holding the commitment C_5 is precluded from the entitlement to hold C_6 and vice-versa).

For instance, if I hold the fundamental commitment C_1 "only God may take life away," I am also *committed* to the subsidiary commitment C_2 "only God may take my life away,"[119] while if I hold the fundamental commitment C_3 "God made men and women equal," I am entitled to the subsidiary commitment C_4 "men and women are still equal." Hence $C_1 \rightarrow C_2$, while $C_3 \succ C_4$. But if I hold the fundamental commitment C_5 "God created everything there is," I am precluded from holding the subsidiary commitment C_6 "there are some things that God did not create." Hence C_5 / C_6.

We will also use the following shorthand notation:

*C means, for a given commitment C, that C / *C, i.e., *C is any commitment incompatible with C. The *negation* of C, expressed by ~C, is a special case of *C.

In this paper, a commitment C_2 *reflects* another commitment C_1 if either $C_1 \rightarrow C_2$ or $C_1 \succ C_2$, i.e., the two commitments are compatible and C_2 can be derived from C_1 either by committive inference or by permissive inference. C_1 then *justifies* C_2 or *serves as a justification for* C_2, while C_2 *is justified by* or *is justified in terms of* C_1.

Note also that while a person *endorsing* a commitment necessarily *holds* that commitment, the converse is not necessarily true. In symbolic notation:

E (X, C) → H (X, C) but ~(H (X, C) → E (X, C)).

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[119] Technically, this is a first-order enthymeme lacking the major premise "my life is an instance of life in general." This paper will largely gloss over such niceties, especially since the inferences at issue are *material*, not *formal* (see Sellars 1953, 313, and n. 116 above), and since most of the inferences we are interested in are *permissive* (the genus of which logical induction is merely one species), rather than *committive* (the genus of which logical deduction is merely one species), so that the problem of enthymemes would not arise even in the case of formal inferences. See Brandom 1994, 168-169: "Inheritance of commitment (being committed to one claim as a consequence of commitment to another) is what will be called a *committive*, or commitment-preserving, inferential relation. Deductive, logically good inferences exploit relations of this genus. But so do materially good inferences, such as inferences of the form: *A* is to the West of *B*, so *B* is to the East of *A*; This monochromatic patch is green, so it is not red; Thunder now, so lightning earlier. Anyone committed to the premises of such inferences is committed thereby to the conclusions. Inheritance of entitlement (being entitled to one claim as a consequence of entitlement to another) is what will be called a *permissive*, or entitlement-preserving inferential relation. Inductive empirical inferences exploit relationships of this genus. The premises of these inferences entitle one to commitment to their conclusions (in the absence of countervailing evidence) but do not compel such commitment. For the possibility of entitlement to commitments incompatible with the conclusion is left open. In this way the claim that this is a dry, well-made match can serve as a justification entitling someone to the claim that it will light if struck. But the premise does not commit one to the conclusion, for it is compatible with that premise that the match is at such a low temperature that friction will not succeed in igniting it."

And a person holding a commitment is entitled to endorse it if and only if the person holds no other commitment that is incompatible with that commitment:

H (X, C) & ~H (X, *C) ➢ E (X, C) and ~(E (X, C) ➢ H (X, *C)).

Fundamental commitments are generally part and parcel of more or less *comprehensive worldviews* or doctrines,[120] which may be religious or secular. Examples are "human life begins at viability of the fetus" and "marriage should only be between one adult man and one adult woman." Although most fundamental commitments are rooted in such socially shared, historically evolved, or divinely revealed comprehensive worldviews, some fundamental commitments may be specific to an individual or independent of any greater worldview, yet beyond question (from the perspective of that individual). Examples might be "I am a brain in a vat" or "FC Barcelona always ought to beat Real Madrid."

Regardless of their origin, what makes a commitment *fundamental* is that the person who holds that commitment sees no need to justify it in terms of other commitments. The person may thus hold the commitment without necessarily being *entitled* to it in terms of other commitments. Fundamental commitments may serve as premises for subsidiary commitments, but they are not themselves conclusions of other commitments. The person holding a fundamental commitment does not care whether he or she is entitled to the commitment, or does not see a need to demonstrate that entitlement; the person holds the commitment anyway, entitlement be damned. As Brandom puts it with respect to the non-technical concept of "faith:"

> [T]here is nothing unintelligible about having beliefs for which we cannot give reasons. Faith – understood broadly as undertaking commitments without claiming corresponding entitlements – is surely not an incoherent concept. (Nor is it by any means the exclusive province of religion.)[121]

A *fundamental commitment* for the purposes of this paper thus corresponds to this informal notion of "faith",[122] but as Brandom points out, "faith" need not be restricted to the religious domain. Someone may hold the fundamental commitment "people should be treated equally regardless of race," even if it is not religiously motivated.

In the eye of the holder, a fundamental commitment does not call out for justifications itself and is not subject to revision. If I believe that "all men are created equal" and that "they are endowed by their Creator with certain unalienable rights," I will be hard-pressed to supply reasons why I hold these truths to be self-evident. I simply believe them (or have come to believe them), and I use them as the basis of my personal political philosophy. No exercise of giving and asking for reasons will justify or undermine such fundamental commitments. I may in practice give reasons to explain my commitments, but these reasons are likely to be for the benefit of the

[120] See Rawls 2005, xviii.
[121] Brandom 2000a, 105.
[122] as "doxastic commitment" in Brandom's terminology corresponds to the informal notion of "belief"

audience, not an actual explanation of why I hold these commitments (for instance: "you wouldn't want your rights to be alienated, hence it's better to believe they're unalienable"). Given the lack of need for justification from the perspective of the person who holds fundamental commitments, they can be described as elements of what one considers to be of "ultimate concern,"[123] or trumps that override other (contingent) considerations and interests.[124]

Note that it matters not where fundamental commitments come from: even if one does not believe that any commitments are *fundamentally* fundamental, one may still find it useful to speak of commitments *as if* they were fundamental. According to Richard Rorty, an avowed non-foundationalist (channeling both Ludwig Wittgenstein and Martin Luther, not to mention Aristotle):

> From a pragmatist's point of view, the notion of 'inalienable human rights' is no better and no worse of a slogan than that of 'obedience to the will of God'. Either slogan, when invoked as an unmoved mover, is simply a way of saying that our spade is turned – that we have exhausted our argumentative resources. Talk of the will of God or of the rights of man, like talk of 'the honour of the family' or of 'the fatherland in danger' are not suitable targets for philosophical analysis and criticism. It is fruitless to look behind them. None of these notions should be analyzed, for they are all ways of saying, 'Here I stand: I can do no other.' These are not reasons for action so much as announcements that one has thought the issue through and come to a decision.[125]

Fundamental commitments thus play only a restricted role in the game of giving and asking for reasons: they may serve as justifications but, from the standpoint of the person who holds them, they do not stand in need of justifications.[126] In the pursuit of this paper's normative goal, we will have to determine whether, given their status as potential premises but not as conclusions, fundamental commitments should be allowed to serve as input to the legislative process, and if so, to what extent.

3.2 Popular commitments and legislative commitments

The embedding of a "bicameral" or "dual-order" approach to commitments in the rules that govern the legislative process as discussed in the previous chapter – i.e., cognitively and procedurally separating out the commitment to pluralism from other, non-pluralistic commitments – has consequences for the relationship between commitments held by individual members of the population (and the legislators who represent them) and the commitments held by legislatures – commitments which, when adopted, are expressed as laws.

Commitments held by members of the population (and the legislators who represent them), or **popular commitments**, are rooted in the religious, secular,

[123] See Tillich 1957, 1.
[124] Cf. Dworkin 1984.
[125] Rorty 1999, 83-84.
[126] They are thus analogous to the *noninferential circumstances of application* under Brandom's conception of *strong inferentialism*. See Brandom 2000a, 28.

philosophical, ethical, etc., worldviews, comprehensive doctrines, and loose constellations of beliefs and values held by individual members of the population and groups of such members. They may tell a story about the way the world is, or they may tell a story about how the world ought to be – this distinction will be made explicit in the following section on "Prescriptive and descriptive commitments." Popular commitments originate in sacred texts, customs and traditions, oral and written narratives, philosophical literature, revelations, profound contemplation of the mysteries of the universe, meditation and prayer, theoretical, practical, and communicative reason, evolutionary survival strategies and prejudices, family upbringing, private and public education, prenatal and childhood experiences, teenage traumas and adult struggles, conflicts between the id, ego, and superego, sublimated desires, peer pressure, economic incentives, false consciousness, brute necessity, intuition and insight, random patterns of neurons firing, hormonal imbalances, schizophrenia, epileptic seizures and hallucinations, peek experiences, or simply the word of God spoken by prophets, burning bushes, or God him- or herself, in whatever form. As we have seen above, popular commitments may be *fundamental*, in which case they may serve as premises in justifications but not as conclusions, or they may be *subsidiary*, in which case they may serve as both premises and conclusions.

It makes little difference to the legislative process under law as pluralism whether a popular commitment, *once offered as input to the legislative process*, is fundamental or whether it is subsidiary, i.e., whether it can be reduced (solely) to more fundamental commitments or not. For this reason, the remainder of the paper will alternate freely between talk of adequacy to fundamental commitments and adequacy to (fundamental or subsidiary) popular commitments: if legislation is adequate to conflicting popular commitments, it is also adequate to the underlying conflicting fundamental commitments which correspond to those popular commitments or from which those popular commitments derive.

Legislative commitments, as opposed to popular commitments, are held by *legislatures*, not individuals (whether members of a population or the legislators who represent them). What it means for a legislature to hold a commitment is that such a commitment may serve as a premise or conclusion or both for justifications expressed within a given legislative process. Where such commitments serve only as premises within a given legislative process but not as conclusions, they are *input commitments* of the legislative process.[127] Where they serve only as conclusions within a given legislative process but not as premises, they are *output commitments* of the legislative process.[128] Such output commitments are expressed as *laws*.[129] Where legislative commitments can serve as both premises and conclusions within the legislative process,

[127] Input commitments thus play an analogous role for legislatures that fundamental commitments play for persons. Within the legislative process, they are analogous to the *noninferential circumstances of application* under Brandom's conception of strong inferentialism. See Brandom 2000a, 28.

[128] These are analogous to the *noninferential consequences of application* under Brandom's conception of strong inferentialism. See Brandom 2000a, 28.

[129] Note that while output commitments serve only as consequences, not premises, within a given legislative process, they may very well serve as premises (and hence as input commitments) for a *subsequent* legislative process. This will become relevant in the discussion on the integrity of law as pluralism in section 7.1 on "Making justifications explicit" below.

they are *intermediate commitments*. Analogously to popular commitments, the legislature may be *committed* to a given legislative commitment in light of other commitments the legislature holds (by committive inference), or the legislature may be *entitled* to a given legislative commitment in light of other commitments the legislature holds (by permissive inference).

To summarize: *Popular* commitments may be *fundamental* commitments or *subsidiary* commitments. *Legislative* commitments may be *input* commitments, *intermediate* commitments, or *output* commitments. Some legislative commitments may correspond to popular commitments, i.e., the *content* of the commitments may be identical or analogous. In particular, popular commitments may in principle serve as input commitments in the sense that the content of a popular commitment may enter the legislative process as the content of a (legislative) input commitment.[130] But it is important to bear the distinction in mind of *who* or *what* holds the respective commitment: popular commitments are held by *persons* (whether members of the population or legislators), while legislative commitments are held by *legislatures.*[131]

In this paper, the following symbolic notation will be used:

H (X, POP) means that a person X holds the popular commitment POP,[132] and

H (L, LC) means that a legislature L holds the legislative commitment LC.

Again, where the context is clear, H (X, POP) will be abbreviated simply as POP, and H (L, LC) will be abbreviated simply as LC.

Since popular commitments may in principle serve as input commitments,[133] it is the case that, where X is a legislator and INP is a popular commitment POP that serves as an input commitment,

$H (X, POP) \rightarrow H (L, INP)$,

i.e., the *legislature* holds any popular commitment (that serves as an input commitment) held by any of its legislatures. This entails that input commitments may be incompatible with each other, given that mutually incompatible popular commitments may serve as input commitments.

[130] In the following, the shorthand terminology "popular commitments may serve as input commitments" will be used, bearing in mind that popular commitments are held by persons and input commitments are held by legislatures. Analogously, popular commitments may be *offered* as input commitments if they are proposed for inclusion as input commitments in the legislative process. Think of this as the population passing a torch to the legislature: the torch is the same, but the hands holding it are different.

[131] In section 5.2 on "Deriving output commitments from input commitments" below, a further complication will be discussed: while legislative commitments are *held* by legislatures, only *individual legislators* can *express* legislative commitments during the legislative process, e.g., by using them as justifications for proposed output commitments. Only once a legislative commitment has been *adopted* as a law – or otherwise explicitly endorsed by the legislature – can one properly speak of a *legislature* itself expressing a legislative commitment.

[132] Or, where X is a legislator, the members of the population represented by X hold the popular commitment POP.

[133] Chapter 4 on "The justificatory constraint of law as pluralism" will discuss *which* popular commitments may serve as input commitments.

Accordingly, *intermediate* commitments derived from these input commitments may likewise be mutually incompatible. But recall that the goal of law of pluralism (and of any coherent legislative process) is to generate laws expressing legislative commitments that are *not* mutually incompatible. This means that the legislative process must find a way to ensure the mutual compatibility of the *output commitments* generated by the legislative process. In other words, the legislative commitments *endorsed* by the legislature – paradigmatically by *adopting* the laws that express output commitments[134] – must be mutually compatible. So, for any given popular commitment serving as an input commitment INP, any given intermediate commitment INT, and any given legislative output commitment OUT, the *set* of popular commitments serving as input commitments may include *INP, and the set of intermediate commitments may include *INT, but the set of output commitments may *not* include *OUT. Any set of legislative commitments merely *undertaken* or *held* by the legislature may be inconsistent, but the set of legislative commitments *endorsed* by the legislature should be consistent. Symbolically, for a legislature L and any legislative commitment LC,

~(H (L, LC) / H (L, *LC)) but (E (L, LC) / E (L, *LC)).

While output commitments may turn out to correspond to or reflect certain popular commitments, *as legislative commitments* they originate in one thing and one thing only: the pluralistic legislative process. They have nothing to say about the truth of popular commitments; they only have something to say about the validity of such popular commitments with respect to the legislative process at hand, given the particular constellation of popular commitments held by the members of the population to be bound by the laws in question.

Of course, output commitments must bear some relation to the popular commitments of the members of the population the laws are to bind. This is what is captured by the notion of *adequacy*: laws expressing output commitments are adequate to the fundamental commitments of the population if and only if the process of negotiating legislation for a given population takes all fundamental commitments held by members of that population as equal input to the process, to the extent achievable, and the output of the process, i.e., the laws generated, reflects that input to the extent achievable, given the extent of the plurality of fundamental commitments within that population. But adequacy is a technical term: it says nothing about the way the world is or ought to be outside the restricted domain of the pluralistic legislative process. In particular, adequacy does not embody any first-order, non-pluralistic commitments; it embodies only the second-order commitment to pluralism. While popular commitments (with all the complexities of their pedigree) serve as inputs to the legislative process, the output commitments are not of the same nature as the popular commitments. In particular, legislative output commitments have no bearing on the sources of the popular commitments, and they say nothing meaningful about those sources or the commitments they give rise to. The relationship between legislative output commitments and the popular commitments they are

[134] There are ways for a legislature to endorse legislative commitments other than adopting laws that express them. This will be discussed in more detail in the section 7.1 on "Making justifications explicit."

adequate to[135] is thus of a *technical, procedural* nature, rather than of a *substantive* nature.[136]

Another way of putting this is: output commitments are not *about* the worldviews that give rise to popular commitments. The negotiation of laws is not *about* the popular commitments that serve as input to the legislative process.[137] Rather, the negotiation of laws is *about* how to bind, in a consistent and enforceable manner, members of a population who hold a particular constellation of conflicting popular commitments.[138]

Unlike popular commitments, output commitments are therefore *pragmatic*: while they are the way they are because of the popular commitments serving as input commitments and the commitment to pluralism that constrains the legislative process, they do not themselves embody beliefs, values, or other bedrock convictions rooted in worldviews, comprehensive doctrines, or the like. They are entirely contingent upon the particular constellation of fundamental commitments held by the population they bind, and they serve as a pragmatic way to structure the binding relationships between members of such a population holding diverse and potentially conflicting fundamental commitments.[139]

This relationship under law as pluralism between (fundamental) popular commitments and (pragmatic) legislative commitments informally and imperfectly captures the secular intuition motivating the separation of church

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[135] Or more precisely: "the relationship between laws expressing output commitments and the popular commitments those laws are adequate to"; the short-cut formulation is used in the body of the text for the sake of simplicity.

[136] Note that unlike *adequacy*, *legitimacy* is not (merely) a technical term: legitimacy has something to say about the way the content of output commitments links up with the content of popular commitments, and in particular whether the content of output commitments (as well as the way output commitments come about) can be supported by a population holding a certain constellation of popular commitments, even if (some of) those popular commitments may conflict with the output commitments in a particular case. But this paper limits itself to adequacy, not legitimacy: the author hopes that a solid conception of adequacy will make the legitimacy of adequate laws intuitive, but the paper does not argue in favor of that intuition.

[137] As Hollenbach 1993, 900, puts it: "I do not think it would be helpful for two judges, one a liberal Catholic and the other a conservative Protestant, to launch into epistemological and theological reasoning to explain why their responses to a piece of legislation regarding abortion are different. These theological and epistemological differences are better dealt with in the discussions that take place in the sphere I have called cultural, not that of the political sphere conceived narrowly as the judiciary or legislature." Garver 2006, 174, claims this is also a sound strategy for persuasion: "I want to be able to listen to a religiously based political argument without thinking that there is also a case concerning religious faith itself that I must somehow attend to. For you to persuade me about a political issue, I have to trust that you are not also trying to persuade me about a religious issue."

[138] The content of laws may of course influence the shape of the popular commitments that were taken into account (or not) during the legislative process. Someone holding a popular commitment may, for instance, feel that a law reflecting that popular commitment *legitimates* the popular commitment itself. Conversely, someone who holds a popular commitment that is not reflected in a law may feel that the law *delegitimates* the popular commitment. Laws may thus very well affect the substance and acceptance of popular commitments. But this is the collateral damage (or desirable side effect, depending on one's viewpoint) of the legislative process under law as pluralism – it is not its raison d'être.

[139] See Kekes 1993, 216: "According to pluralism, therefore, the state's advocacy of particular substantive values is restricted to particular circumstances and specific conflicts. As a result, the state could not become the advocate of any value in general; it could only become an advocate of particular conflict-resolutions."

and state, or the separation of religion and politics, according to which religious questions should be haggled over in the private (i.e., non-legislative) sphere, while questions of how to govern the relationships between members of a pluralistic society, regardless of their religious convictions, should be deliberated in a forum free from religious controversy.[140]

But law as pluralism cuts across worldviews differently from the secular conception of separation of church and state, or from the liberal conception of separation of religious talk from political talk: under law as pluralism, *all* fundamental questions, whether religious, secular, philosophical, ethical or otherwise, should be haggled over in the non-legislative sphere, while questions of how to govern the relationships between members of a pluralistic society, regardless of their fundamental convictions (whether religious, secular, philosophical, ethical or otherwise), should be deliberated in a forum free from *fundamental* controversy. Unlike the secular notion of separation as church and state or the liberal notion of separation of religion and politics, law as pluralism makes no a priori distinction between secular commitments and religious commitments. This approach puts secular and religious commitments at eye level. Secular commitments are not privileged over religious commitments under law as pluralism: both types of fundamental commitment are treated equally prima facie by the pluralistic legislative process.[141]

However, law as pluralism does not entail a free-for-all with respect to commitments and their admissibility as justifications; this would be law as relativism. It does draw a line between commitments that may serve as justifications for laws and those that may not. In particular, it draws a line between popular commitments that may serve as input commitments to the legislative process and those that may not – but this line is not the same as under secular liberalism.

Where to draw this line is the subject matter of chapter 4 on "The justificatory constraint of law as pluralism." But before we can proceed, one final and crucial distinction is necessary: between prescriptive and descriptive commitments.

3.3 Prescriptive and descriptive commitments

So far, we have distinguished between popular commitments (which may be fundamental commitments or subsidiary commitments) and legislative

[140] See Rorty 1999, 170-171, on "Religion as Conversation-stopper" for a succinct expression of this intuition: "Contemporary liberal philosophers think that we shall not be able to keep a democratic political community going unless the religious believers remain willing to trade privatization for a guarantee of religious liberty […]." As Asad 2003 puts it, coming from a perspective more critical of this intuition: "From the point of view of secularism, religion has the option either of confining itself to private belief and worship or of engaging in public talk that makes no demands on life."

[141] On the relevant connection between liberal and secular views on the role of religion in politics, see Connolly 1999, 10: "Secularism and liberalism are connected, though neither is entirely reducible to the other. […] Liberalism draws your attention to questions of rights, justice, tolerance, and the role of the state, whereas secularism draws it to the character of public discourse, the role of religion and nonreligion in public life, and so on."

commitments (which may be input commitments, intermediate commitments, or output commitments). We have also distinguished between commitments a person or legislature must be committed to in light of other commitments (by committive inference) and commitments one is entitled to in light of other commitments (by permissive inference).

The distinction between popular commitments and legislative commitments brings into starker relief the difficulties packed into the notion of *adequacy* and allows us to formulate our normative goal in a way that pinpoints those difficulties more precisely: how can we define rules governing the negotiation and adoption of legislation which ensure that the *legislative commitments* outputted by the legislative process are adequate to the *popular commitments* that serve as input to the legislative process? And in pursuing that goal, how can we draw a line between popular commitments that may serve as input commitments to the legislative process and those that may not? Is there a distinction between different kinds of commitments that may help us draw that line?

A consideration of the distinct characters of legislative commitments and popular commitments helps us take a first stab at that challenge: while legislative commitments outputted by the legislative process have a predominantly *normative* character, i.e., they make a claim about *how the world ought to be*, popular commitments potentially inputted to the legislative process may either have a normative character or a *descriptive* character, i.e., they may also make a claim about *how the world is*. *Descriptive* commitments correspond to the belief that a state of affairs *obtains* – i.e., they purport to state facts about the world. In contrast, *normative* commitments correspond to the belief that a state of affairs *ought to obtain* – i.e., they say something about how the world ought to be, whether it actually is that way or not. Descriptive commitments are *factual* statements; normative commitments may be *counterfactual* statements.

The statement "men and women are equal" thus expresses a descriptive commitment; the statement "men and women should be treated equally" expresses a normative commitment. As seen in these examples, descriptive commitments are commonly expressed using the copula "is (not)," while normative commitments are commonly expressed using modal verbs indicating recommendation or obligation, such as "should (not)" or "ought (not)." When used more urgently as a command[142], normative commitments are commonly expressed using the modal verb "shall (not)"; when used to grant or deny permission, the modal verb "may (not)" is commonly used.[143]

A terminological blurriness relating to this distinction between descriptive and normative commitments should be addressed briefly before we proceed. Statements about the way the world is can be assigned a truth value, i.e., they

[142] in the second or third person

[143] Throughout this paper, the modal verb "ought (not)" will generally be used to express popular commitments and legislative commitments that are not output commitments (i.e., input commitments and intermediate commitments), while the modal verbs "shall (not)" and "may (not)" will generally be used to express legislative output commitments, i.e., legislative commitments that have been endorsed through adoption. This distinction reflects the legally binding nature of legislative output commitments, as opposed to the non-legally-binding nature of popular commitments and legislative input and intermediate commitments.

may be *true* or *false*. It is therefore intuitive to say that a descriptive commitment may be *true* or *false*. In contrast, it is not obvious that statements about the way the world *ought* to be can be assigned a truth value, i.e., it is not obvious that it makes sense to say they are *true* or *false*.[144] Hence, it is not obvious that normative commitments can be said to be *true* or *false*, strictly speaking. For example, while the descriptive claim that "veils are a sign of discrimination against women" can be assigned a truth value (whatever that truth value may turn out to be), it is not obvious that the normative claim that "women ought to wear veils in public" can be assigned a truth value.[145] Assigning a truth value to normative commitments, i.e., saying that normative commitments are *true* or *false*, is particularly problematic if one does not believe that there are *normative facts* about the world, but rather only *descriptive facts*.[146] This paper adopts a methodological agnosticism with respect to the existence of normative facts, and simply for purposes of simplicity and legibility will freely use the truth values *true* and *false* to refer to all statements expressing commitments, whether they are descriptive or normative.[147]

In principle, the legislative commitments expressed by laws may be either descriptive or normative. Descriptive legislative commitments are often packed into the preambles of legislation, for instance, and the legislative history of adoptions is replete with statements not only about how the world ought to be, but also about how the world is (purported to be). Judicial opinions are often not only normative in nature, but also descriptive, and they may draw on the descriptive commitments explicit or implicit in the legislative (or constitutional) enactments upon which they are (purported to be) based.

Nevertheless, there is something intrinsically normative as opposed to descriptive about most legislative output commitments, as reflected in the fact that we speak of legislation as expressing legal *norms*, not legal *facts*.[148] While the descriptive commitments expressed in legislation and its history and interpretation may guide the specific application of laws, the function of legislation – in light of its origins and social role – is predominantly normative, not descriptive. This is in contrast to, say, the natural sciences, which at least purport to be descriptive, not normative. The normative commitments expressed by legislation may reflect certain descriptive commitments, but legislation is not generally about such descriptive

[144] See, e.g., Habermas 2004, in which Habermas proposes the concept of "rightness" as the equivalent of "truth" when referring to normative statements. According to Finlayson 2005, Habermas views "rightness" and "truth" as species within the overarching genus of "validity."
[145] This is related to the problem in the philosophy of language of whether normative statements are properly considered *propositions*. See Marmor 2008, 425: "It is an open question, and a rather controversial one at that, whether prescriptive utterances are basically propositions or not."
[146] By contrast, moral realists, for instance, are unlikely to have difficulties with the idea of normative facts. For a recent proponent of moral realism in the political context, see Harris 2010.
[147] As already discussed in subsection 2.2.2 above, the terms *valid* and *invalid* will continue to be used in a technical sense to refer to popular commitments that are (not) reflected in legislative output commitments.
[148] See Marmor 2008, 425: "Legal utterances typically do not consist of descriptive statements. Legal norms prescribe modes of conduct, grant rights, impose obligations, and so on. In short, the content of the law is typically prescriptive."

commitments. Legislation only incidentally makes pronouncements about the way the world is; its primary function is to determine how the world ought to be.

The slope between descriptive commitments and normative commitments is notoriously slippery, a slipperiness that we cannot neglect in our discussion of legislative commitments, either.[149] Philosophers watchfully stand guard against the naturalistic fallacy of deriving moral facts from natural facts,[150] while in everyday speech, statements like "human life is worthy of protection" blur the distinction between descriptive and normative and raise controversial ontological questions.[151] In the context of legislative negotiations, this slippery slope becomes particularly treacherous in light of the *essentially contested concepts* prevalent in politics.[152]

Connolly shines a light on this ambiguity between descriptive and normative concepts by focusing on the *appraisive* aspect of such concepts: "Essentially contested concepts… are typically *appraisive* in that to call something a 'work

[149] The recognition of this slipperiness goes back at least to Hume 1739, book III, part I, section I: " In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given; for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it."

[150] See G. E. Moore 1903, Chapter 1 § 10: "It may be true that all things which are good are also something else, just as it is true that all things which are yellow produce a certain kind of vibration in the light. And it is a fact, that Ethics aims at discovering what are those other properties belonging to all things which are good. But far too many philosophers have thought that when they named those other properties they were actually defining good; that these properties, in fact, were simply not "other," but absolutely and entirely the same with goodness. This view I propose to call the "naturalistic fallacy" and of it I shall now endeavour to dispose."

[151] The statement can be unpacked as the normative commitment "human life ought to be protected," but if one posits the existence of moral facts, "worthy of protection" may be deemed as descriptive a property as "fleeting" or "sublunar."

[152] Gallie 1956, 171-172, establishes the paradigmatic conditions of the essential contestability of a concept as follows: "(I) it must be *appraisive* in the sense that it signifies or accredits some kind of valued achievement. (II) This achievement must be of an internally complex character, for all that its worth is attributed to it as a whole. (III) Any explanation of its worth must therefore include reference to the respective contributions of its various parts or features; yet prior to experimentation there is nothing absurd or contradictory in any one of a number of possible rival descriptions of its total worth […] In fine, the accredited achievement is *initially* variously describable. (IV) The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance. […] (V) […] each party recognizes the fact that its own use of it is contested by those of other parties, and […] each party must have at least some appreciation of the different criteria in the light of which the other parties claim to be applying the concept in question." Essentially contested concepts cited by Gallie include "work of art," "democracy," and "Christian doctrine," but essentially contested concepts in politics cover all "loaded" terms such as "life," "liberty," "marriage," "property," and so on, to the extent these terms or the *use* thereof constitutes a valued (social, historical, cultural, theological) achievement. Note Gallie's reference to the contested "use" and "application" of a concept – this pragmatic (as opposed to merely semantic) approach to essential contestability will be relevant in the chapters that follow.

of art' or a 'democracy' is both to describe it and to ascribe a value to it or express a commitment with respect to it."[153] Connolly is skeptical about the very idea of a value-free description: "[T]o describe is to characterize a situation from the vantage point of certain interests, purposes, or standards."[154] He goes on to cite Julius Kovesi: "[W]e always describe from *some* point of view, never from a perspective we could call the 'descriptive point of view.'"[155]

As Connolly points out, "[t]he connection within the concept itself of descriptive and normative dimensions helps to explain why such concepts are subject to intense and endless debate."[156]And further: "Not all concepts in politics are formed from a moral or, more broadly, normative point of view, but many are."[157] Because of this prevalence of essentially contested concepts in politics – which often reflect mutually incompatible popular commitments – the conflation of descriptive and normative commitments into appraisive commitments will also complicate our analysis of different types of legislative commitments and their relationship to popular commitments.[158] Despite the complications raised by Connolly, is there still a notion of descriptive versus normative commitments we can work with to help draw a line between popular commitments that may serve as input commitments to the legislative process and those that may not?

Let's take a closer look at the normative function of legislation: laws are not generally about how the *world* ought to be, but more specifically about how *human beings* ought to be, or more precisely about how human beings ought to *act*. Although the subject matter of laws may ostensibly not be restricted to

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[153] Connolly 1993, 22. Rescher 1993, 135, makes an analogous point: "Evaluative disagreement is basic to disagreement in general. Even factual disagreement generally roots in evaluative conflicts, arising when different parties apply different norms and standards to the evaluation of evidence, and thus bring different *cognitive* values to bear."

[154] Connolly 1993, 23, italics in the original omitted.

[155] Connolly 1993, 24-25, citing Kovesi 1967.

[156] Connolly 1993, 22.

[157] Connolly 1993, 27. Cf. the related remark in J. L. Austin 1975, 4 n. 2, in reference to the common confusion between descriptive (or, in Austin's terminology, "constative") utterances and "performative" utterances, which carry out the normative function of law: "Of all people, jurists should be best aware of the true state of affairs. Perhaps some now are. Yet they will succumb to their own timorous fiction, that a statement of 'the law' is a statement of fact." Cf. also Hart 1994, 57, and his analogy between the normative aspects of chess and the normative aspects of law: "Each not only moves the Queen in a certain way himself but 'has views' about the propriety of all moving the Queen in that way. These views are manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened, and in the acknowledgement of the legitimacy of such criticism and demands when received from others. For the expression of such criticisms, demands, and acknowledgements a wide range of 'normative' language is used. 'I (You) ought not have to have moved the Queen like that', 'I (You) must do that', 'That is right', 'That is wrong'." Even in a restricted domain such as chess – let alone a restricted but enormously more expansive domain such as the law – the straightforward distinction between descriptive and normative collapses.

[158] Eng 2000 tackles this conflation head-on, calling for a "fusion" of descriptive and normative propositions in legal argumentation, in which descriptive and normative propositions are more or less tightly interwoven and "graduated" in terms of dimensions and degrees. From the perspective of law as pluralism, there is nothing objectionable in this *semantic* fusion for the purposes of legal argumentation and interpretation; but the following discussion nevertheless attempts to make a *pragmatic* distinction between descriptive and normative (or rather, prescriptive) commitments in order to screen out inadmissible input commitments for the purposes of lawmaking.

human beings, but may, for instance, cover animals, plants, viruses, corporations, emissions, the climate, forests, parks, outer space, collateralized debt obligations, currencies, territorial boundaries, natural resources, Internet protocols, communication frequencies, intellectual property, and so on, laws are simply dead letters on parchment (or dead pixels on screens) if they do not, explicitly or implicitly, tell human beings what to do. This is most obvious in the case of criminal law, which generally, though not always,[159] is about constraining and punishing human conduct; but it is also true with respect to *any* of the subject matters of legislation. Laws cannot tell viruses, corporations, territorial boundaries, etc., what to do, other than directly or indirectly via the human beings who potentially have an effect on those non-human entities. This obvious fact is often obscured by the passive formulations, ellipses, and abstractions of many or even most laws ("the right of trial by jury shall be preserved," "the interest rate shall not exceed 15% per annum," "the corporation shall be held liable for any breach of contract"), but ultimately, the acts of individual human beings are necessary to fulfill any of the norms set out in legislation (the right of trial by jury can only be preserved by law enforcement officers, prosecutors, and judges; interest rates can only be held at 15% or less by bank officers preparing, approving, and signing loan documents; and a corporation can only be held liable for breaches of contract if the members of its board of directors and its chief financial officer release the necessary funds, perhaps pursuant to an order issued by a judge). It would of course make no practical sense for all laws to be addressed explicitly and exclusively to human beings, as opposed to governments, interest rates, corporations, etc., but this should not make us forget that *all* laws are ultimately aimed at guiding the behavior of human beings and are impotent if they fail to do so.

Legislative output commitments are therefore primarily expressed by *norms for human conduct*.[160] These norms often have a *constraining* function: they guide human conduct by telling human beings what they must do or what they must not do, or else terrible consequences will ensue. But norms may also have an *enabling* function: they enable human beings to get married, conclude enforceable contracts, fly to the moon, and so on, by establishing the institutions, providing the incentives, and mobilizing the resources to get things done that would not be possible (or even conceivable) otherwise. Enabling norms often also have a constraining component: it is impossible to get married unless civil servants are legally obliged as well as empowered to perform marriages; it is impossible to conclude enforceable contracts unless

[159] Corporate criminal responsibility is a burgeoning field.

[160] A more conversational way of putting this would be "rules for human conduct," but this paper restricts the use of "rule" to the rules that guide *legislators* negotiating within legislatures. "Norms" guide the behavior of all human beings, not just legislators. This distinction between "norms" and "rules" corresponds roughly to the distinction made by Hart between "primary rules" and "secondary rules," at least as the latter relate to the conduct of legislators; see Hart 1994, 80-81: "It is true that the idea of a rule is by no means a simple one: we have already seen […] the need, if we are to do justice to the complexity of the legal system, to discriminate between two different though related types. Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings [and in this case, legislators] may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations."

breaches of contract are subject to the constraint of penalties; and it is impossible to fly to the moon unless the national treasury is required by law to cough up the necessary billions of dollars. Similarly, norms enabling the actions of some human beings constrain the actions of other human beings: enabling a married woman to freely choose to abort a fetus constrains the ability of her husband to have a (legitimate) child; enabling women to vote constrains the ability of men to choose their own rulers; enabling black families to live in whatever neighborhood they choose constrains the ability of white families to live among themselves. Constraining and enabling norms may occur separately or jointly, as two sides of the same coin; what is relevant to this analysis is that they both *guide* human conduct in a normative sense.

The legislative output commitments that interest us for the purposes of this paper are therefore a restricted subset of commitments, namely *normative* commitments that *guide human conduct*. As discussed in the previous chapter, legislative commitments under law as pluralism are pragmatic, not fundamental. This is not the case under all conceptions of law: arguably, at least some laws under the doctrine of natural law are fundamental, and certainly laws derived from religious systems of belief and practice (such as from Canon, Shari'a, Talmudic law) have a fundamental component because of the intimate link between religion and law in those systems. But for the purposes of defining law as pluralism, the legislative output commitments we are interested in are *pragmatic*, *normative* commitments that *guide human conduct*.

By substituting this restricted subset of legislative output commitments into the formulation of the paper's normative goal, we can now ask: how can we define rules governing the legislative process so that the *pragmatic, normative output commitments that guide human conduct* are adequate to the *popular commitments serving as input commitments*?

This formulation leads to the following observation: the popular commitments serving as input commitments that are problematic with respect to the adequacy of laws (and the normative output commitments they express) are those *popular commitments that purport to guide human conduct*. This is where the clash between popular commitments serving as input to the legislative process and the legislative commitments outputted by that legislative process is most likely to occur – in other words, the area in which adequacy will be most difficult to attain when the relevant popular commitments conflict with each other. Other normative popular commitments serving as input commitments are less problematic because they do not link up with laws (and the output commitments they express) in the relevant way: an input commitment to making the world a better place or to saving the spotted owl from extinction cannot conflict with a law if the input commitment has nothing to say about human conduct. If I believe that the spotted owl ought to be saved, but I do not believe that guiding human conduct is relevant to achieving that goal (say instead that I believe spotted owls should voluntarily relocate to safer habitats), then *no* laws guiding human conduct can conflict with my belief that the spotted owl ought to be saved.

We will call normative commitments that purport to guide human conduct – i.e., commitments that purport to *oblige* or *permit* a human being to act in a certain way – **prescriptive commitments**.[161] All other commitments are **descriptive commitments**.[162] The notion of prescriptive commitments provides us with a more precise tool for separating out the prescriptive aspect of nominally descriptive commitments. For instance, while the statement "human life is worthy of protection" appears to be descriptive on the surface, it nevertheless has *prescriptive force*[163] equivalent to the commitment "everyone ought to protect human life." (If it does not have such prescriptive force, i.e., if it is analogous to the commitment to the preservation of spotted owls without anything to say about human conduct, then it is a descriptive commitment.)

How does this help us with Connolly's challenge of appraisive concepts? Does the threat of conflation of normative and descriptive concepts identified by Connolly also apply to the distinction between prescriptive and descriptive concepts?

Both prescriptive commitments and descriptive commitments indeed have appraisive aspects. They both may have a point of view. The prescriptive commitment "everyone ought to protect human life" certainly is appraisive, but so is the descriptive commitment "that is a work of art." But even though both commitments are appraisive (i.e., they both have normative aspects, even though one is normative on the surface and the other is not), the first commitment purports to guide human conduct while the second commitment does not. So these prescriptive and descriptive commitments are conflated with respect to their appraisive and normative aspect, but not with respect to their prescriptive aspect. Determining whether a commitment has a prescriptive aspect or not suffices to classify it as a prescriptive or a descriptive commitment, regardless of whether it has an appraisive/normative aspect or not.

What is relevant here is that prescriptive commitments are those that *purport* to guide human conduct, as opposed to those that *actually* guide human conduct. *Any* commitment is prescriptive if the intention behind that commitment is to guide human conduct – and that intention is an (appraisive) fact. By their nature, legislative output commitments purport to guide human conduct and are hence prescriptive. Some popular commitments likewise purport to guide human conduct and are thus prescriptive; while those that

[161] The term "prescriptive" follows Marmor 2008. A more precise alternative to "prescriptive" in this context would be the technical term "deontic," relating generically to obligation and permissibility, and most commonly used in reference to (deontic) logic and (deontological) ethics, both of which bear affinities with the deontic conception of legislation elaborated here. The term "deontic" used in this way also has an appealing ancestry in the relevant philosophy of language (Brandom 1994 is saturated with it) and in philosophy of law (cf., e.g., Ronald Moore 1973 and Kraus 2002). But no one in their right mind should be expected to know what "deontic" means.

[162] Descriptive commitments, for the purposes of this paper, thus include both descriptive commitments proper (such as "CO_2 emissions cause global warming") and non-prescriptive normative commitments (such as "the average global temperature ought to be lower than it currently is"), which do not directly or indirectly provide a guide for human conduct. For most legislative purposes, the existence of such non-prescriptive normative commitments can safely be ignored, as it will be in the remainder of this paper.

[163] See Brandom 2000b, 366.

do not purport to guide human conduct are descriptive. But both may be an appraisive conflation of descriptive and normative.[164]

Because both have prescriptive force, conflicts between popular commitments serving as input commitments and legislative output commitments – and the question of adequacy of output commitments to popular commitments – are most likely to arise between prescriptive popular commitments and output commitments (which, in light of the function of legislation, are also primarily prescriptive).

The following chapter on "The justificatory constraint of law as pluralism" will take a closer look at the distinct features of these two types of popular commitments serving as input commitments with respect to the adequacy of laws. But first, we will examine a preliminary step on the way to that justificatory constraint: the regulative ideal of law as pluralism.

[164] The claim here is not it any way that descriptive commitments are more *objective* than prescriptive commitments. The analysis of objectivity in Brandom 1994, 495-613, for instance, would be equally applicable to descriptive commitments and to prescriptive commitments as defined here. Similarly, there is nothing more *empirical* about descriptive commitments than about prescriptive commitments. As Rescher 1993, 76-77, argues, it is in fact the empirical basis of descriptive commitments that entails pluralism: "[T]he empirical basis of our factual knowledge is bound to engender a variety of alternative cognitive positions through the variation of experience. For the cognitive exploitation of different *bodies* of experiences – let alone different *sorts* of experiences – is bound to lead rational enquirers to different results. Given the diversity of human experience, empiricism entails pluralism. The experiential diversity of differently situated rational inquirers must mean that they are destined to reach variant conclusions about the nature of things. In a human community of more than trivial size, dissensus rather than consensus is the normal condition." The claim in this paper is rather merely that a distinction between descriptive commitments and prescriptive commitments makes *pragmatic* sense with respect to the limited domain of lawmaking.

4 The justificatory constraint of law as pluralism

4.1 The regulative ideal of law as pluralism

4.1.1 Defining the regulative ideal

Under the conception of pluralism put forward in section 2.2 above, prima facie equal validity ought to be accorded to all popular commitments offered as input commitments to the legislative process, even where such commitments are incompatible with each other. The purpose of the legislative process under law as pluralism is to ensure that the set of the laws generated by that process is not inconsistent or unenforceable, i.e., the legislative process is a procedure by which popular commitments offered as input commitments are winnowed out that would lead to an inconsistent or unenforceable output. Since *all* popular commitments offered as input commitments should be reflected in the legislative output to the extent no inconsistency or unenforceability arises, the output of the legislative process should, *prima facie*, reflect all popular commitments offered as input to the regulative process.

Laws outputted by the legislative process express prescriptive commitments and, moreover, are intended to be *binding* and *enforceable*, not simply subject to voluntary compliance. They may thus conflict with prescriptive popular commitments that purport to guide the behavior of human beings in a manner incompatible with the prescriptive output commitment expressed by the law. But since the conception of pluralism requires that prima facie equal validity be accorded to *all* popular commitments offered as input commitments – including prescriptive popular commitments – this suggests a **regulative ideal of law as pluralism** as a corollary to the conception of pluralism:

> Under law as pluralism, laws – which express legislative output commitments – should prima facie only bind members of the population whose fundamental commitments do not conflict with the legislative output commitments expressed by those laws.

Why is this a regulative ideal?[165] It is *regulative* in the sense that it provides a *guide for legislative action*: it seeks to describe the kind of legislative action that would best implement the conception of pluralism. But it is an *ideal* rather than a *rule*, because it does not determinatively constrain the behavior of legislators. The justificatory constraint of law as pluralism developed in this chapter is the rule which aims to implement the regulative ideal of law as pluralism.

[165] Regulative ideals (as an often unattainable but desirable endpoint serving to orient human thought and action) have had a long tradition in philosophy, political and otherwise, since at least Kant 1787. Rawls 1999a, Rawls 2005, and Habermas 1996, for instance, are replete with them. C. S. Peirce's "community of investigators" grounding his pragmatic theory of truth is another prominent example, of which Habermas 1993, for instance, makes extensive use.

4.1.2 Internal and external obligations to follow a norm

What does it mean for a law, as a kind of *norm*, to "bind" someone? Two senses of binding must be distinguished here: an internal obligation to follow a norm, and an external obligation to follow a norm. In the terminology developed in section 3.1 above, a person is under an internal obligation to follow a norm if she *endorses the prescriptive commitment* expressed by that norm or if she endorses a commitment that entails that prescriptive commitment by committive inference. This means that I acknowledge the commitment *as my own*, and I commit myself to the further commitments that follow from that commitment. For instance, if I endorse the commitment not to eat meat, I am under an internal obligation to say no when offered a pork chop for dinner at a friend's home, even if no one other than me enforces that commitment or monitors my performance of that obligation. An internal obligation to follow a norm is, in a Kantian sense, an expression of my autonomy as a person. Trivially, norms expressing commitments can bind only those who have endorsed those commitments or the commitments that entail them, if "bind" is taken to signify an internal obligation to follow a norm.[166]

In that sense, laws – which generally express prescriptive commitments – can never themselves bind any individual member of a population in the sense of an *internal* obligation, since laws are always external to individuals: the commitments expressed by laws cannot be endorsed by anyone other than the legislature that adopts the laws, and hence they cannot be acknowledged by anyone other than the legislature *as one's own*. At most, commitments expressed by laws may *correspond to* commitments undertaken by individual members of a population, i.e., the content of the legislative commitment may be identical to the content of the popular commitment, even though the commitments themselves can only be undertaken separately by their respective authors (i.e., the legislature and the member of the population, respectively). For instance, a law intended to prohibit the consumption of meat may correspond to the commitment by individual members of the population not to eat meat. However, it is only the latter commitment, not the former commitment, that binds individual members of the population in the sense of an *internal* obligation. Simply put: norms expressing legislative commitments are always *external* obligations, while norms expressing commitments held by individual members of a population are always *internal* obligations.[167]

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[166] On this relationship in Kant between autonomy and rule-following in the context of commitments and entitlements as applied here, see Brandom 2009, 15: "Earlier Enlightenment thinkers (for instance, in the social contract tradition of political thought, culminating in Rousseau) had already had the idea that normative *statuses* such as responsibility and authority (commitment and entitlement) are not independent of the normative *attitudes* of those who acknowledge such responsibility or authority. Kant radicalizes this idea into a criterion of demarcation of the normative – a way of distinguishing normative constraint from various sorts of non-normative compulsion – in terms of *autonomy*. One is genuinely *normatively* bound only by rules one has bound *oneself* by, concepts one has oneself applied in judging or acting."

[167] Kant 1796/2007, 26 n. 4, draws on this distinction in his definition of external (juridical) freedom: "It is the privilege to lend obedience to no external laws except those to which I could have given consent." External freedom is therefore where the content of the external obligation coincides with the (perhaps counterfactual) content of the internal obligation.

The sense of binding that is relevant to laws is therefore the *external* obligation to follow such norms, i.e., an obligation that is monitored and enforced by actors external to each individual member of the population on whom the norm is binding. The precise means by which external obligations are monitored and enforced and the incentives for compliance with such obligations are the subject matter of the *authority* of laws – authority may involve coercion or the treat of coercion,[168] social and peer pressure, or a more nuanced form of authority that derives from the correspondence between external obligations and internal obligations, which in turn is related to the *acceptance* and *legitimacy* of laws.[169] Again, however, this paper is concerned with the *adequacy* of laws, a concept orthogonal to the concepts of legitimacy, acceptance, and authority: for the purposes of this paper, we are solely interested in whether external obligations expressed by laws are adequate to the fundamental commitments of the population they bind, not whether they are legitimate or enjoy authority and acceptance.[170] The notion of *enforcement* will however play an important role in law as pluralism, as will be explored below in chapter 6 on "Recursive pluralism," but questions of the legitimacy, acceptance, and authority of such enforcement are not relevant to law as pluralism.

If "bind" is taken to signify an external obligation to follow a norm, legislative commitments expressed by laws may very well bind members of a population who have not undertaken those commitments, i.e., whose fundamental commitments conflict with the commitments outputted by the legislative process. As we have seen in section 3.2 on "Popular commitments and legislative commitments," the negotiation of laws (under law as pluralism) is not *about* the popular commitments that serve as input to the legislative process. Rather, the negotiation of laws is *about* how to bind, in a consistent manner, members of a population who hold a particular constellation of conflicting popular commitments. Legislative negotiations (under law as pluralism) therefore generate laws without in general modifying the fundamental commitments of legislators and the members of the population they represent: popular commitments are not bent into shape during the legislative process in order to make them correspond to the outputted legislative commitments.[171] Laws emerging from a pluralistic

[168] The concept of law expounded by John Austin 1832 and critiqued by Hart 1994.

[169] For an influential discussion of this nuanced conception of the authority of legislation, see Raz 2009. Another important tool for understanding authority and acceptance is Wollheim's paradox (simply put, the paradox of how to accept a law of ø when one endorses a commitment of not-ø); see the discussion in Waldron 1999a, 246-249.

[170] Although, as pointed out in subsection 1.3.3 above, it is surmised that adequacy is one good basis for arguing legitimacy.

[171] Although this is what many liberal theorists in general and deliberative democrats in particular hope the political process will achieve. This hope underlies the classic conception of the "marketplace of ideas" (implied in *Abrams v. United States,* Justice Holmes, dissenting; articulated in *Keyishian v. Board of Regents*) as developed, for example, by Mill 1859, and the "reflective equilibrium" propounded by Rawls 1999a and Rawls 2005. It is in part motivated by the epistemological claim that truth will emerge through discourse, see generally Locke 1689. For a classic formulation of this hope in the "forum" of deliberative democracy, see Elster 1997. Law as pluralism does not have such high hopes (and does not make such an epistemological claim about truth), at least not with regard to the *legislative* process engaged in by *legislators* as described here, or at least it does not presuppose that such high hopes are necessary to undertake joint (legislative) projects. Whether the political process as a whole, engaged in by the general population as manifested by civil society, the media, stakeholder

legislative process are therefore in practice likely to conflict with the fundamental commitments of at least some of the members of the population to be bound by the laws, even where the goal of the legislative process is to generate laws that are adequate to the conflicting fundamental commitments of the members of the population they bind.

The "prima facie" clause in the formulation of the regulative ideal of law as pluralism takes account of this fact, playing a similar role as in the formulation of the conception of pluralism: as in the conception of pluralism, the presumption of equal validity of input commitments is upheld only to the extent achievable, i.e., the legislative output will reflect only those popular commitments offered as input commitments that do not lead to inconsistency or unenforceability. Without the "prima facie" qualification, the regulative ideal of pluralism would amount to a regulative ideal of relativism. In other words: laws adopted under law as pluralism will bind *all* members of the population,[172] even where the fundamental commitments of individual members of the population conflict with the legislative commitments expressed by those laws. What the regulative ideal of law as pluralism demands, however, is that even though some members of the population will in fact be bound by laws conflicting with their fundamental commitments, and their behavior is thus changed by those laws, the determination of those laws should be guided by the *ideal* that the laws should only bind members of the population whose fundamental commitments do not conflict with the legislative commitments expressed by those laws.

A succinct way of formulating this is: binding laws *change the behavior* of members of the population to the extent that their behavior (prior to adoption and enforcement of the law, or counterfactually if the law were not adopted and enforced) would otherwise be guided by fundamental commitments that are incompatible with the commitments reflected by the law. The regulative

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groups, and so on, can bend popular commitments into shape is not at issue here. For contrasting views on the impact the (democratic) political process should have on individual preferences (including, presumably, fundamental commitments), see Lijphart 1984, 1: "An ideal democratic government would be one whose actions were always in perfect correspondence with the preferences of all its citizens. Such complete responsiveness in government has never existed and may never be achieved, but it can serve as an ideal to which democratic regimes should aspire," and the response by Inoue 2005, 117: "By setting the responsiveness to people's preferences (which may involve a variety of naked special interests) as the democratic ideal, [Lijphart] disregards the fundamental role of deliberation in democracy that consists in transforming people's preferences. In the deliberative perspective, people's preferences as exogenous variables should not be the exclusive or dominant criteria for estimating the quality of democratic process. What counts as much or even more is the endogenous variable of this process, namely, whether and to what extent people can cultivate the public-spirited and well considered judgments within the process." See also Michelman 1988, 1531, who claims that regardless of the impact the legislative process may have on popular commitments, other forums are more important: "The full lesson of the civil rights movement will escape whoever focuses too sharply on the country's most visible, formal legislative assemblies – Congress, state legislatures, the councils of major cities – as exclusive, or even primary, arenas of jurisgenerative politics and political freedom. I do not mean that those arenas are dispensable or unimportant. Rather I mean the obvious points that much of the country's normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics, and that in modern society those formal channels cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement." What was true in 1988 is arguably even more true in 2011.

[172] At the level at which the legislation is adopted; this qualification will be discussed in more detail in chapter 6 on "Recursive pluralism."

ideal of law as pluralism constitutes a *presupposition* against changing the behavior of members of the population (to the extent that behavior reflects their fundamental commitments[173]) by way of laws, but it does not preclude such changes to behavior if consistency and enforceability of the laws cannot be achieved otherwise.

To what extent is this presumption non-arbitrary? Or would some other regulative ideal of law as pluralism be less arbitrary? Recall the trivial observation that norms expressing commitments can only bind those who have undertaken those commitments, if "bind" is taken to signify an internal obligation to follow a norm. The regulative ideal of law as pluralism is a normative extension of this (descriptive) trivial observation so as to include external obligations: under the regulative ideal of law as pluralism, laws expressing legislative commitments *ought to*, *prima facie*, only bind those who have undertaken commitments that correspond to those legislative commitments, if "bind" is taken to signify an *external* obligation to follow a norm.

Is it permissible to "extend" a descriptive observation in that way in order to concoct a normative ideal? Is this an impermissible leap from *is* to *ought*? As indicated above in section 3.3 on "Prescriptive and descriptive commitments," the relationship between descriptive and normative statements is problematic, and the problems involved in deriving normative statements from descriptive statements will be discussed in chapter 5 on "Decomposing and synthesizing commitments." For now, suffice it to say that if the (normative) regulative ideal of law as pluralism is in fact implemented with respect to the legislative process, and if the resulting pluralistic legislative process is then *described*, the commitments outputted by the legislative process will bear an analogous relationship to individual members of the population as *external* obligations (provided the external obligations are not inconsistent or unenforceable) as the fundamental commitments of individual members of the population will bear to them as *internal* obligations. In other words, the laws expressing legislative commitments (where such laws are generated by a legislative process guided by the regulative ideal of law as pluralism) *can* only bind those who have undertaken the corresponding fundamental commitments, if "bind" is taken to signify an external obligation to follow a norm; this is a descriptive statement equivalent to the observation we have taken to be trivial. In this sense, the regulative ideal of law as pluralism is indeed *non-arbitrary*: the legislative commitments outputted by the legislative process guided by it are analogous to the fundamental commitments of the population bound by those legislative commitments (always with the proviso that the output is consistent and enforceable).

For the sake of argument, assume that this extension is not permissible, i.e., that laws expressing legislative commitments *need not*, *prima facie*, only bind

[173] Naturally, some people (and all people sometimes) behave in a manner inconsistent with their own fundamental commitments. This is the paradox captured by the parable of Ulysses and the Sirens (see Elster 1984 and 1998) and is the rationale underlying the precommitment motive discussed above in subsection 2.3.2 on "Qualifying motives"): Peter drunk may behave in a manner inconsistent with the commitments of Peter sober; Ulysses may fall for the Sirens even though he is committed to returning home to Penelope. Laws embodying such precommitments do not pose a problem for the regulative ideal of law as pluralism, as long as the entire population shares the same precommitments.

those who have undertaken commitments that correspond to those legislative commitments, if "bind" is taken to signify an *external* obligation to follow a norm. Then the (thus reformulated) regulative ideal of law as pluralism must include some *prima facie* criteria for treating some fundamental commitments held by members of a population differently from others. What would those prima facie criteria be? They would have to be criteria derived from fundamental commitments other than the commitment to pluralism. But which fundamental commitments would these be? They would have to be some subset of the fundamental commitments held by members of the population. This means that the fundamental commitments chosen to ground the criteria would be treated differently from the fundamental commitments not chosen to ground the criteria – and the criteria for making *that* choice would again be derived from some subset of the fundamental commitments held by members of the population, and so on. This reformulated regulative ideal of law as pluralism would never get off the ground, unless it arbitrarily[174] postulated some set of privileged fundamental commitments to serve as trumps – which would violate the conception of pluralism on which the regulative ideal of law as pluralism is stipulated to be based.

4.1.3 The regulative ideal and adequacy

While the conception of pluralism gives us a basis for how to treat popular commitments offered as input commitments (they should be accorded equal validity, to the extent achievable), the regulative ideal of law as pluralism tells us something about the nature of output commitments (they should only bind those who hold compatible fundamental commitments, to the extent achievable). Taken together, the conception of pluralism and the regulative ideal of law as pluralism provide a useful gloss on the two-part conception of **adequacy** under law as pluralism:

> Laws are adequate to the fundamental commitments of the members of the population they bind if the legislative process is guided by the conception of pluralism (ensuring that popular commitments offered as input commitments are accorded equal validity, to the extent achievable) and if the legislative output is guided by the regulative ideal of law as pluralism (ensuring that the output commitments only bind those who hold compatible fundamental commitments, to the extent achievable).

While the conception of pluralism constitutes a presumption against privileging a fundamental commitment offered as an input commitment (or a set of such commitments) over others, the regulative ideal of law as pluralism

[174] In what sense would this selection of privileged fundamental commitments be *arbitrary*? It might, after all, be rationally and reasonably justifiable in terms of some more or less comprehensive worldview or political conception: a commitment to treating women and men equally, for instance, is rationally and reasonably justifiable in terms of most contemporary forms of political liberalism; the commitment to gender equality would thus not be arbitrary from the perspective of someone committed to the relevant premises of political liberalism. But it would still be arbitrary from the perspective of someone who does not share that commitment to the relevant premises of political liberalism: and choosing whose perspective to take would itself be an arbitrary decision from the perspective of the population as a whole.

constitutes a presumption against changing people's behavior (to the extent it reflects their fundamental commitments) by way of laws. A law is adequate under law as pluralism if these *presumptions* are intact, even if privileging of some commitments over others takes place in fact in order to ensure consistency and enforceability.

The justificatory constraint of law as pluralism developed in this chapter implements the conception of pluralism and the regulative ideal of law as pluralism in practice, and therefore also the conception of adequacy.

4.2 Justification implements adequacy

What is the relationship between *adequacy* and *justification*? As stated in the preliminary definition of adequacy in subsection 1.3.3, there are two components to adequacy with respect to justification: a condition on the fundamental commitments admissible as potential justifications, and conditions on the use of those admitted fundamental commitments as justifications for laws actually adopted. According to the formulation of adequacy under law as pluralism developed at the end of the last section, laws are adequate to the fundamental commitments of the members of the population they bind if the legislative process is guided by the conception of pluralism (i.e., if the *negotiation* of the laws takes account of all popular commitments offered as input commitments to the extent achievable) and if the legislative output is guided by the regulative ideal of law as pluralism (i.e., if the *adopted laws* reflect all popular commitments offered as input commitments to the extent achievable). The first component of adequacy is thus *internal* to the legislature, and the second component of adequacy is *external* to the legislature: guidance by the conception of pluralism relates to the *internal* component of adequacy, namely the requirements on the *negotiation* of the laws, or in other words the internal workings of the legislative process; guidance by the regulative ideal of law as pluralism relates to the *external* component of adequacy, namely the requirements on the *adoption* of laws, or in other words the external relationship of the legislative process to the population bound by the outputted laws.

Justification is the way in which both forms of guidance are implemented: the legislative process is guided by the justifications given for each step of that legislative process in terms of the conception of pluralism; legislative output is guided by the justifications given for each element of that output in terms of the regulative ideal of law as pluralism. Justification gives substance to guidance by the conception of pluralism and by the regulative ideal of law as pluralism: it ensures that guidance is not merely an empty concept, but rather can be verified with reference to the justifications given for each step and each element of that guidance.

The internal component of adequacy is primarily implemented by the *internal justification* of the legislative process, i.e., how popular commitments are treated and justified during legislative negotiations. The external component of adequacy is primarily implemented by the *external justification* of the adopted laws, i.e., how output commitments are treated and justified once legislative negotiations are over. Justification is the hinge which connects the

internal and the external components of adequacy: if commitments serving as input to the legislative process are used as internal justifications for each step of the legislative process, the outputted laws from which they derive will be justifiable externally with respect to those selfsame commitments – i.e., with respect to the fundamental commitments of the members of the population bound by the outputted laws.

If a law expressing an output commitment can be justified in terms of the popular commitments serving as input commitments, it is adequate to those commitments: the legislature is thus *entitled* to hold the commitments expressed by the adopted laws.[175] If it can be shown that the legislature is not entitled to hold a certain output commitment because it cannot be justified in terms of the popular commitments serving as input commitments, then a law expressing that output commitment is not adequate to the fundamental commitments of the population it binds.

Justification is thus the act by which the adequacy of laws to fundamental commitments can be demonstrated. Justifying a law in terms of an input commitment is to claim that the law *reflects* the input commitment, i.e., that the legislative commitment expressed by the law is compatible with the input commitment and can be derived from it.

Under the conception of relativism, *all* popular commitments could serve as input commitments and hence be used as internal justifications during the legislative process; under the corollary regulative ideal of law as relativism, laws would be justifiable in terms of *all* fundamental commitments held by the population. But as we have seen in subsection 2.2.1 above, a legislative process guided by the conception of relativism would lead to laws which, while honoring the regulative ideal of law as relativism, would be inconsistent or unenforceable. Without prejudging the *content* of input commitments, is there a non-arbitrary way (i.e., a way compatible with the conception of pluralism and the regulative ideal of pluralism) to separate out the kinds of popular commitments that may serve as input commitments and hence be used as justifications during the legislative process (and therefore also as justifications for the laws outputted by that process) from those that cannot, in order to ensure consistency and enforceability of the outputted legislation?

In other words: the justificatory constraint of law as pluralism we are developing must be able to constrain the behavior of legislators with respect to the justifications they invoke for taking positions during legislative negotiations and for adopting certain laws as opposed to others.

[175] This is the technical sense of entitlement elaborated in section 3.1 on "Fundamental and subsidiary commitments" above: the entitlement to hold a commitment, given the other commitments one holds. It does not have anything to say directly about the *legitimacy* of the commitment – but this discussion does give an indication of why adequacy might be a good basis on which to develop a theory of legitimacy.

4.3 Public justification

The quest for such a justificatory constraint of law as pluralism is not dissimilar to the quest for a conception of *public justification* or *public reason*.[176] Like the justificatory constraint of law as pluralism, public justification aims to separate out the kinds of commitments that may be invoked as justifications in political or legal discourse. According to Rawls,

> The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood.[177]

The demand for public justification – at least in pluralistic, Western societies – is particularly salient when the values in question are derived from religious commitments. As Connolly puts it, "Pluralists think it is extremely important […] *how* people of diverse faiths hold and express their faiths in public space."[178] Obama sums up the basic expectation succinctly:

> What our deliberative, pluralistic democracy does demand is that the religiously motivated translate their concerns into universal, rather than religion-specific, values. It requires that their proposals must be subject to argument and amenable to reason. If I am opposed to abortion for religious reasons and seek to pass a law banning the practice, I cannot simply point to the teachings of my church or invoke God's will and expect that argument to carry the day. If I want others to listen to me, then I have to explain why abortion violates some principle that is accessible to people of all faiths, including those with no faith at all.[179]

Sajó formulates this "translation" explicitly in terms of translation from religious reasons to secular reasons:

> Secularism expresses the need for legal choices to be based on secular public reasons, that is, on reasons accessible to all, quite apart from their religious beliefs. Religiously grounded reasons have to be 'translated' into secular ones. For most translation theories, the requirement of a public reason is satisfied as long as the legislative reasons are presented and accepted on grounds reasonably accessible to all – that is, on grounds that do not presuppose some act of faith or belief in scripture, and without the constitutional arrangement itself being an act of faith.[180]

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[176] The literature on public justification is vast, incestuously self-referential, and has become a central theme of liberal political theory and criticisms thereof. For a general overview, see D'Agostino 2008.

[177] Rawls 2005, 226. Rawls 2005 is the seminal work on public reason, see especially 212-254 on "The Idea of Public Reason," as supplemented by Rawls 1997 on "The Idea of Public Reason Revisited." Rawls bases his conception of public reason on what he calls the "duty of civility" incumbent on the citizens of a free and equal society. Rawls restricts his consideration of public reason to constitutional essentials and basic issues of justice; see Rawls 2005, 214. This restriction is ignored or tempered by many theorists (e.g., Greenawalt 1987 and 1995, Audi 2000, Gaus 1996) and is not relevant to this paper's argument concerning the justificatory constraint of law as pluralism.

[178] Connolly 2005, 48.

[179] Obama 2006, 219.

[180] Sajó 2008, 626, internal citation omitted.

As indicated by Rawls, Obama, and Sajó, many conceptions of public justification focus on the *reasonableness* or *rationality* of the commitments invoked as justifications, with the aim of keeping unreasonable or irrational justifications, however defined, out of the political sphere.[181] Some of the proposed restrictions on unreasonable justifications amount to a rejection of commitments, for the purpose of political and legal discourse, that are not supportable by secular argumentation,[182] while others seek to specify what qualifies as reasonable in terms of what is acceptable by the other participants in the discourse.[183] Other theorists of public reason take a less restrictive view of the commitments that may be invoked as justifications, arguing that justifications not accepted by the other participants in the discourse in light of the religious commitments underlying those justifications will in any event not serve as useful tools for persuading others and hence, as a matter of strategy, will generally be omitted in practice without the need for a theory as to what qualifies as reasonable.[184] Finally, there are those who argue that religious commitments and the justifications relying on those commitments can be a welcome way to reinvigorate otherwise value-drained political discourse by reintroducing questions of fundamental and often moral convictions, even if this entails a more controversial and conflict-laden discourse.[185]

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[181] See D'Agostino 2008, who stresses the centrality of the (essentially contested) concept of *reasonableness* to the debate, as well as its connection to *legitimacy*: "The idea [of public justification] is, roughly, that no regime is *legitimate* unless it is reasonable from every individual's point of view." The relationship between reasonableness and rationality is problematic: Rawls 2005, 48-54, develops an idiosyncratic distinction between reasonableness and rationality that will be critiqued by Connolly on p. 79 below. D'Agostino 2008 largely conflates the two terms, at least on the empirical (as opposed to the normative) reading of public justification: "On the empirical reading, some proposal is reasonable from some particular person's point of view only if that person has beliefs and desires which, according to h/er own scheme of reasoning, support that proposal to the degree, which, by h/er standards, is required" – an understanding of reasonableness that comes close to Rawls's understanding of rationality. For the purposes of this paper, not much hinges on any distinction between reasonableness and rationality, and it instead suffices to think of both as essentially contested concepts. What *does* matter to law as pluralism is the *thin* conception of rationality (or reasonableness) developed in the following section.

[182] See especially Audi 1993 and Audi 2000, who calls for a "*principle of secular rationale*" and a "*principle of secular motivation*"; see Audi 2000, 86 and 96.

[183] See, e.g., Rawls 2005 and Habermas 1993 for approaches to the problem of acceptability that call for more or less actual acceptance (more in the case of Habermas, less in the case of Rawls); see, e.g., Gaus 2003, for a counterfactual analysis of acceptance. Rawls himself is situated on the more restrictive end of the spectrum of conceptions of public justification, like others who advocate stringent criteria for what counts as public, such as Gutmann and Thompson 1996 and Solum 1993 (limiting public reasons to common-sense beliefs, ideas from the public political culture, and the noncontroversial conclusions of science). Habermas has recently (2005) adopted a slightly less restrictive conception of public justification compared with his earlier work.

[184] See, e.g., Greenawalt 1993, Greenawalt 1987 and 1995 (developing a theory of the "accessibility" of reasons to others), Alexander 1993 (advocating a more inclusive but avowedly liberal conception derived from the value of autonomy), and Möllers 2010 (emphasizing that inaccessible reasons will, as a matter of practice, seldom be employed in political discourse with aspirations for success). Obama 2006, 208, makes the same point in relation to actual legislative practice in the United States.

[185] Restrictive conceptions of public justification have met with objections ranging from spirited to vicious: see, e.g., Perry 1993 and 1997, Weithman 2002, and Smith 2010 (who acknowledge many of the points raised by advocates of public justification, but believe they are outweighed by the benefits of free and open discourse) or Wolterstorff 1984, Carter 1993, and Eberle 2002 (who argue that public justification amounts to discrimination against those

The special concern of public justification with religious commitment boils down to the fear that expressions of faith are particularly prone to unreasonableness, thus bringing conversation to a halt before it has even begun. As Rorty puts it, "The main reason religion needs to be privatized is that, in political discussion with those outside the relevant religious community, it is a conversation-stopper."[186] In a critique of Stephen Carter, Rorty emphasizes the pernicious role that unreasonable *premises* play in this regard:

> So when Carter complains that religious citizens are forced 'to restructure their arguments in purely secular terms before they can be presented' I should reply that 'restructuring the arguments in purely secular terms' just means 'dropping reference to the sources of the premises of the arguments', and that this omission seems a reasonable price to pay for religious liberty.[187]

Audi motivates his call for secular justifications with reference to the same concern: "Where religious convictions are a *basis* of a disagreement, it is, other things equal, less likely that the disputants can achieve resolution or even peacefully agree to disagree."[188] In his call for public justification, Obama similarly emphasizes the difference in the *bases* of faith and reason:

> For those who believe in the inerrancy of the Bible, as many evangelicals do, such rules of engagement [i.e., the requirement of public justification] may seem just one more example of the tyranny of the secular and material worlds over the sacred and eternal. But in a pluralistic democracy, we have no choice. Almost by definition, faith and reason operate in different domains and involve different paths to discerning truth. Reason – and science – involves the accumulation of knowledge based on realities that we can all apprehend. Religion, by contrast, is based on truths that are not provable through ordinary human understanding – the "belief in things not seen."[189]

But Rorty himself acknowledges that this distinction between different kinds of premises stands on shaky ground:

> Carter thinks that 'contemporary liberal philosophers … make demands on [the religion's] moral conscience to reformulate that conscience – to destroy a vital aspect of the self – in order to gain the right to participate in the dialogue alongside other citizens'. But this requirement is no harsher, and no more a demand for self-destruction, than the requirement that we atheists, when we

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with strong religious convictions). See Audi and Wolterstorff 1996 for a direct debate on the salient points. For a view orthogonal to those mentioned above, see Sterba 1999, who attempts to bridge the controversy with an appeal to the ideal of fairness as requiring collective restraint on the majority as a whole rather than individual constraints on members of the majority. Finally, D'Agostino 1996 focuses on the essential contestability of public justification itself, and attempts to resolve the controversy through a pragmatic (and largely pragmatist) model of a workable and evolving consensus.

[186] Rorty 1999, 171. Rorty goes on to quote Carter 1993: "One good way to end a conversation – or to start an argument – is to tell a group of well-educated professionals that you hold a political position (preferably a controversial one, such as being against abortion or pornography) because it is required by your understanding of God's will."

[187] Rorty 1999, 173.

[188] Audi 2000, 69, emphasis added.

[189] Obama 2006, 219.

> present our arguments, should claim no authority for our premises save the asset we hope they will gain from our audience.[190]

This passage reflects both Rorty's pragmatism and his privileging of social progress over truth: it is irrelevant to Rorty what the sources of premises are, as long as they can be used to tell a story about the society we would like to live in. But this also draws attention to the general difficulties in grounding *any* premises – and in particular *any* fundamental commitments – reasonably or rationally. In a critique of Rawls distinction between reasonableness and rationality, Connolly expresses this skepticism as follows:

> The outcomes of rational calculations depend upon the premises adopted. Self-interest, for instance, does not serve as a sufficient basis for justice. "What rational agents lack is the particular form of moral *sensibility* that underlies the desire to engage in fair cooperation as such [Rawls]." What else is needed, then? Well, agents of justice are "reasonable" people. They are willing to accept reciprocal limits. Rawls's use of the word "reasonable" may suggest that this sensibility is a necessary companion of rationality, while it seems to me to be better understood as a kissing cousin of traditional theories of virtue. For by what procedure or mode of argument is reasonableness attained? On what logic is it grounded? Rawls says the disposition comes from a fortunate cultural tradition that already embodies it. Though for reasons yet to be discussed, Rawls does not like to emphasize this point, it is nested within cultural practices never entirely reducible to logic or rationality.[191]

The problem facing law as pluralism is that it cannot take such cultural traditions – which provide the premises for reasonableness and rationality – for granted. This removes culturally thick understandings of reasonableness and rationality as a basis for deciding which popular commitments may be admitted to the legislative process and which may not.[192] Connolly goes on to ask what should be done where this culturally shared basis is lacking:

> Note that Rawlsians are now unable to find the sufficient rational ground for justice they habitually accuse post-Nietzscheans of lacking. Reasonableness finds its grounds in itself and when it is already widely shared in a cultural tradition. But what does a Rawlsian moralist appeal to when such a tradition is deeply conflictual, or weak, or active in some domains and absent in others? What do Rawlsians appeal to, that is, when the appeal is most needed? Rawls has nothing compelling to say in such cases. This is because, in a way reminiscent of John Caputo, Richard Rorty, and Jürgen Habermas, he rules "comprehensive doctrines" out of public discourse in order to protect the impartiality of justice.[193]

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[190] Rorty 1999, 173. Rorty 2003 updates his thoughts on conversation-stoppers somewhat, but if anything, this evolution further underscores the idea that religion is not special as a conversation-stopper. See, e.g., Rorty 2003, 148-149: "[I]nstead of saying that religion was a conversation-stopper, I should have simply said that citizens of a democracy should try to put off invoking conversation-stoppers as long as possible. We should do our best to keep the conversation going without citing unarguable first principles, either philosophical or religious. If we are sometimes driven to such citation, we should see ourselves as having failed, not as having triumphed."

[191] Connolly 1999, 64, internal citations omitted.

[192] On this basic distinction between thin and thick understandings, see Walzer 1994.

[193] Connolly 1999, 64. Connolly goes on to propose a post-Nietzschean remedy for this dilemma with respect to the public sphere at large; this paper shares Connolly's recognition of the underlying problem, but its remedies are limited to the restricted sphere of lawmaking.

The danger Connolly identifies is that in a sufficiently pluralistic society, there is little space left for justification to be public in the sense demanded by Rawls and other advocates of public justification. Irrespective of the consequences for the public sphere as a whole, this means that while both public justification and the justificatory constraint of law as pluralism aim to separate out the kinds of commitments that may be invoked as justifications, the line they draw between admissible commitments and inadmissible commitments will be different.

4.4 Justificatory constraint vs. public justification

The analysis in the preceding section puts us in a position to show more clearly how the justificatory constraint of law as pluralism differs from the various conceptions of public justification. It differs in at least four fundamental ways: First, it aims solely at *legislative discourse*, i.e., the negotiation of laws within a legislature, as stipulated in the first ground rule of this paper.[194] The justificatory constraint of law as pluralism applies only to legislatures as a socially constructed institution that can be made subject to explicit rules. Law as pluralism as elaborated in this paper is agnostic as to the kind of discourse that is useful or should be permissible in society as a whole, and in particular in the public sphere that generates the popular commitments that may be offered as inputs to the legislative process.[195] The justificatory constraint of law as pluralism is only concerned with which inputs should be admitted to the legislative process, and with what to do with those inputs once they have entered the legislative process. In this sense, the justificatory constraint of law as pluralism is compatible with a wide range of

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For extended critiques of the reasonableness or rationality (though not necessarily the desirability) of the premises underpinning "secular" or "Western" societies, see generally Taylor 2007 and Asad 2003. This difficulty is also identified by Waldron 1993, 846, with respect to the underpinnings of liberalism (and specifically property rights): "The question is, which is the most plausible premise with which to begin our own (secular) discussion of property? Here, though, the problem points to a general issue in liberal philosophy. Our theories of basic rights, of property and justice, of the respect due to the human person, are all rooted historically in theories of natural law and in conceptions that were specifically theistic and, indeed, Christian in approach. We are now engaged in the business of developing ways of thinking about politics and justice that abandon that orientation. As we do that, we – or, I should say, many of us – are determined to maintain as rich a sense as possible of the dignity of the human individual, the equality of worth of all men and women, and the urgency and priority of justice."

[194] Thus narrowing Connolly's claim about pluralists cited on p. 76 above: the justificatory constraint of law as pluralism is a constraint on how *legislators* with (or representing) diverse fundamental commitments hold and express those commitments *in the legislative sphere*. Different conceptions of public justification range from a narrow set of actors to a broad set of actors to which those conceptions are to apply. Rawls 2005, 443, for instance, limits his consideration of public reason to "judges in their decisions, […] government officials, especially chief executives and legislators […and] candidates for public office and their campaign managers." Greenawalt 1987 and 1995 distinguish different shades of public reasons that should be expected of different actors, e.g., legislators vs. common citizens. Others, e.g., Gaus 1996, Gutmann and Thompson 1996, and Audi 2000, develop a conception of public justification that is generally applicable to *all* citizens engaging in political discussion in the public sphere. This latter strain is particularly prevalent also among theorists of deliberative democracy. See, e.g., Cohen 1989 and Habermas 1993.

[195] See the discussion in section 7.4 on "The public sphere as generator of popular commitments" below.

conceptions of public justification, as long as such conceptions are limited to discourse that takes place outside legislatures.

Second, the justificatory constraint of law as pluralism serves as an actual *rule* constraining the behavior of legislators, not simply a recommendation for what constitutes praiseworthy conduct.[196] Most conceptions of public justification are not properly *enforceable*, other than through peer pressure and calls to good citizenship. Given that the justificatory constraint of law as pluralism is addressed to a clearly delineated group of (more or less) professional legislators already subject to constraints on their behavior in the form of rules of procedure, constitutional rules, and the like, enforcement of the justificatory constraint of law as pluralism is at least feasible.

Third, the justificatory constraint of law as pluralism differs from conceptions of public justification to the extent such conceptions hinge on the reasonableness or rationality of fundamental commitments used as the *premises* of justification. In light of the conception of pluralism endorsed here, the justificatory constraint of law as pluralism cannot distinguish between secular, religious, or other sources of justifications by including some sources and rejecting others for the purposes of legislative discourse. Theories of reasonableness, including those that distinguish between secular and religious or public and private sources of justification, are themselves rooted in fundamental commitments that, under the conception of pluralism, must be treated equally prima facie to other theories of reasonableness, such as those holding that revelation, tradition, sacred texts, and the like, are equally reasonable sources of justification as theoretical and practical reason,[197] communicative reason,[198] and other Enlightenment-inspired forms of secular reason.[199] Pending a universally acceptable theory of reasonableness and rationality, particularistic theories of reasonableness or rationality cannot be used as a basis for the justificatory constraint of law as pluralism to evaluate the admissibility of premises of justification.

Instead, the justificatory constraint of law as pluralism relies on a thin conception of rationality limited to the *inferences* that can be drawn from such premises of justification: namely a conception according to which commitments and entitlements can properly be attributed to a person in light of the other commitments that person has undertaken, in conjunction with the principles of committive and permissive inference as applied to those commitments.[200] This means that the *premises* expressed in the commitments a

[196] See in particular the discussion in section 7.2 on "Rules of legislative procedure" and section 7.3 on "Constitutional rules and meta-constitutional rules" below. It is not always entirely clear whether conceptions of public justification are meant to be obligatory or permissive; see Ebels-Duggan 2010 for an attempt at classification (and a critique of the obligatory variant).
[197] Elaborated paradigmatically by Kant 1787 and Kant 1788.
[198] Elaborated paradigmatically by Habermas 1984.
[199] As examples of "reasonable" attempts to use sacred texts as a basis for political justification, see Kim and Draper 2008 and Khan 2008.
[200] This corresponds to the "technical" conception of reason according to Ely 1980, 56: "Technically, of course, reason alone can't tell you anything: it can only connect premises to conclusions. To mean anything, the reference has to be somewhat richer, to implicate the invocation of premises along with the ways in which one reasons from them." Garver 2006, 170, in arguing that rationality is an essentially contested concept, links the thin conception of rationality to the problem of coercion: "When rationality is a contested concept, so too is

person has undertaken need not be reasonable or rational; they might be derived from hexagrams in the *I Ching*, the fragments of oracle bones, or random patterns of C-fibers firing. However, the *conclusions* that may be drawn from those premises, in light of the principles of committive and permissive inference, are not similarly up for grabs: they are subject to the practice of giving and asking for reasons that makes communication possible and is the minimum prerequisite for undertaking joint projects.[201]

Fourth, and closely related to the third point regarding reasonableness, the justificatory constraint of law as pluralism is interested only in the *adequacy* of legislation in light of the commitments used to justify it, not the *legitimacy* thereof. Reasonableness is a crucial aspect of the legitimacy of legislation;[202] the thin conception of rationality used here is a crucial aspect of the adequacy of legislation. This fourth point tracks the claim made in subsection 1.3.3 above that law as pluralism is not primarily concerned with legitimacy.

To the extent that law as pluralism privileges this thin, inferentialist conception of rationality over thicker conceptions of rationality or reasonableness, the justificatory constraint of law as pluralism bears some resemblance to those theories of public justification (as restricted to legislative discourse) that take a "generous" view of the kinds of justifications that may be employed in legislative negotiations. In particular, the justificatory constraint of law as pluralism does not prima facie exclude justifications that are rooted (solely) in particularistic worldviews and systems of value and morality that are not shared or reasonably acceptable or accessible by all participants in the discourse, and it does not preclude the suggestion that the inclusion of such justifications in legislative discourse may have certain benefits. Law as pluralism is also open to the possibility that some justifications will be omitted in practice, as a matter of strategy, because they fail to persuade, rather than pursuant to some theory of what counts as a "good" justification.

But, given the need under law as pluralism for the outputted laws to be adequate to *all* popular commitments, to the extent achievable in terms of consistency and enforceability, the justificatory constraint of law as pluralism must, compared with these "generous" conceptions of public justification,

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coercion, and liberal democrats and religious advocates often differ on what counts as coercion, and consequently on what counts as rational. However much we might disagree about whether a particular case is coercive, the standard is clear. Anything I cannot talk back to is coercive and irrational." The thin conception of rationality advanced in this paper in terms of "giving and asking for reasons" is simply that: ensuring the ability to talk back.

[201] Note that there is considerable flexibility here: the further commitments and entitlements attributed to X by Y in light of the commitments X has already undertaken need not be the same as the further commitments and entitlements acknowledged by X in light of the same commitments. This is the principle underlying the essentially perspectival character of conceptual contents according to Brandom's inferentialism, i.e., the need to keep two sets of books on one's own commitments and entitlements and those of others; see the discussion in Brandom 1994, 586-592, and in subsection 5.2.2 on "Keeping two sets of books on the legislative process" below. On this account, there is no single, "rational" perspective; the minimum prerequisite for communication requires simply the ability to keep track of one's own commitments and entitlements and those of others, and to justify *inferences* (not fundamental commitments serving as *premises*) when called upon to do so.

[202] Again, see D'Agostino 2008: "The idea [of public justification] is, roughly, that no regime is *legitimate* unless it is reasonable from every individual's point of view."

establish stricter criteria for what counts as an admissible justification within the legislative process and what does not.

Under law as pluralism, laws (and the proposals that result in such laws) need not be reasonable or rational in a thick sense (according to whatever theory of reasonableness or rationality), but they do need to be *justified* in terms of popular commitments serving as input commitments to the legislative process – and in that sense must be rational in a thin sense. Since justification implements adequacy, laws cannot be adequate to fundamental commitments of the population they bind if they cannot be justified in terms thereof. If reasonableness or rationality (or, say, the distinction between secular and religious commitments) cannot be taken as the criterion for separating out the justifications that can be used as premises in legislative discourse from those that cannot, in order to achieve consistent and enforceable legislation that is adequate to the popular commitments offered as input commitments, then the justificatory constraint of law as pluralism must draw on other criteria for that purpose.

To determine what those criteria might be, the following two sections consider how output commitments can be justified in terms of input commitments. As discussed in section 3.3 on "Prescriptive and descriptive commitments" above, popular commitments offered as input commitments may be either prescriptive or descriptive, and hence input commitments themselves may be either prescriptive or descriptive. We are thus concerned with the adequacy of laws (which generally express prescriptive output commitments) to both these types of input commitments. Since justification implements adequacy, laws (and the proposals that result in such laws) must be *justified* in terms of prescriptive input commitments and descriptive input commitments.[203]

The two types of justification – in terms of prescriptive input commitments and in terms of descriptive input commitments – have distinct grammatical forms and distinct consequences for the legislative process. First, we shall turn to justification in terms of prescriptive input commitments.

4.5 Justification in terms of prescriptive input commitments

4.5.1 Grammatical form of prescriptive commitments

The fundamental grammatical form of statements expressing prescriptive input commitments (which are intended to guide human conduct) is

[203] As Black 1964, 168, points out, there is a view that since ought-statements make no truth claims at all, as discussed on p. 61 above, this disqualifies them from serving either as premises or conclusions. This would seem to complicate the attempt to analyze inferences from prescriptive input commitments to output commitments, and from any input commitments to prescriptive output commitments. But aside from the open question of whether ought-statements do or do not in fact make truth claims, this concern is largely obviated here by the fact that we are dealing with *material* inferences rather than *formal* inferences in legislative negotiations, and that most of these inferences are *permissive* (i.e., akin to inductive reasoning) rather than *committive* (i.e., akin to deductive reasoning). See n. 116 on p. 51 and n. 119 on p. 52 above. But even if the inferences at issue were formal, deductive inferences, Black 1964 provides suggestions on how to work around the problem.

analogous to the fundamental grammatical form of statements expressing legislative output commitments (which are likewise intended to guide human conduct, i.e., they are also predominantly prescriptive).[204] In the simplest case, such statements are of the grammatical form "X ought to A," where X is a person or class of persons and A is an action. This simplest form can be extended and refined in several ways: where the prescriptive commitment is intended to be explicitly compulsory or coercive, the simplest derivative form is "X shall (not) A," and where the prescriptive commitment is intended to be explicitly permissive or enabling, the simplest derivative form is "X may A." As we have seen in section 3.3 on "Prescriptive and descriptive commitments" above, prescriptive commitments can be expressed using a wide range of different possible grammatical forms, including passives, ellipses, abstractions, and so on, which may or may not specify an "X" denoting a natural person or class of natural persons. Nevertheless, as we have seen, laws can *always* be reduced to norms applicable to individual human beings, and this is similarly true of the prescriptive commitments serving as input to the legislative process.

Both prescriptive input commitments and output commitments are expressed using the modal verbs "ought," "shall," "may," "must" and the like in their *deontic* (i.e., *prescriptive*) mode,[205] meaning that both classes of commitments have direct implications for human conduct. Given the institutional purpose of legislation, output commitments are most often expressed using the modal verbs "shall (not)" and "may," expressing compulsion/prohibition and permission respectively, while prescriptive input commitments may have a broader range of prescriptive force, including the recommendatory "should" and the analogous interpretation of "ought." Despite the slightly larger set of modal verbs typically available to prescriptive input commitments than to output commitments, both classes of commitments can be expressed using the schema "X [deontic modal verb] A," and any given prescriptive input commitment of the form "X [deontic modal $verb_1$] A" maps directly onto an output commitment of the form "X [deontic modal $verb_2$] A," where [deontic modal $verb_1$] and [deontic modal $verb_2$] differ at most in the degree of compulsion/permission, but not the direction, of their force.

4.5.2 No gap between input and output commitments

Prescriptive input commitments expressed with the help of deontic modal verbs map directly onto analogous output commitments likewise expressed

[204] But see Ronald Moore 1973, arguing that the deontic (or, in the terminology used here, prescriptive) force of laws differs from the deontic force of non-laws, given that laws not only bind citizens, but also officials, who are responsible for imposing sanctions if the laws are violated by citizens. Non-laws, by contrast, do not include obligations relating to sanctions imposed by officials. Moore argues that this distinction makes it difficult to apply deontic logic straightforwardly to laws. While this may be true, ignoring the role of officials does no harm to the analysis presented in this subsection and the following subsection, since the relevant analogy between prescriptive input commitments and output commitments does not obtain between descriptive input commitments and output commitments, regardless of the role of officials and sanctions.

[205] As opposed to their *epistemic* mode, which is irrelevant here; e.g. "you must be Dr. Livingstone" or "that ought to be about right." For an overview of the relevant concepts relating to modal verbs, see Roméro 2005, especially chapter 4.5.

with the help of deontic modal verbs. This means that no further commitments are necessary to get from a prescriptive input commitment to the analogous output commitment – the only difference[206] between a prescriptive input commitment and the analogous output commitment is that the former is held by an individual legislator (and/or the members of the population he or she represents), while the latter is held by the legislature as a collective body. In such a case, the legislature does not hold any additional commitments other than those held by the legislator – the only difference consists in who or what does the holding. There is no gap between the content of the prescriptive input commitment and the content of the output commitment, only a difference between the subjects to whom the commitment can be attributed. This gap does not need to be filled by any additional commitments.

Another way of looking at this is to imagine that the legislature consists only of a single legislator: then the gap between the subjects to whom the commitment can be attributed disappears. The legislative commitment outputted by the legislative "process" would be *the same* as the prescriptive input commitment.[207] No additional commitments would be needed to get from the input commitment to the output commitment.

What of output commitments that are not strictly analogous to prescriptive input commitments in the sense of *one* prescriptive input commitment mapping directly onto an output commitment, i.e., output commitments that are derived from a consistent *set* of prescriptive input commitments held by a legislator (and/or the members of the population she represents)? This only insignificantly complicates the picture: the prescriptive input commitments would still be *sufficient* to generate the output commitment; no additional commitments would be needed to get from the input commitments to the output commitment. Or in the counterfactual situation where the legislature consists only of a single legislator: given the legislator's input commitments, the legislator would be *entitled* to hold the output commitment without any additional commitments.

These considerations of the relationship between prescriptive input commitments and output commitments have consequences for justification within the pluralistic legislative process (where the legislature consists of more than one legislator): laws and the proposals which give rise to them can be justified *directly* in terms of analogous prescriptive input commitments or in terms of consistent sets of prescriptive input commitments. Given the regulative ideal of law as pluralism, laws – which express legislative output commitments – should prima facie only bind members of the population whose fundamental commitments do not conflict with the legislative output

[206] Other than perhaps a difference in the degree of compulsory/permissive force, as indicated in the preceding paragraph.

[207] Strictly speaking, this is only true of the relationship between the output commitment and the prescriptive input commitment held by the *legislator*, as opposed to the members of the population represented by the legislator: while the output commitment would be *internal* to the legislator (acting as the entire legislature), it would still be *external* to the members of the population (even though its content would coincidence exactly with the content of their fundamental commitments). Only in a direct democracy consisting of a single person would this distinction between internal and external collapse for the member (!) of the population as well.

commitments expressed by those laws. As a legislator, I can thus cite a prescriptive input commitment directly as a justification for the analogous output commitment: it is permissible for a law expressing that legislative commitment to bind the members of the population I represent, since their fundamental commitments correspond to the output commitments at issue and hence do not conflict with them.

Where there are no conflicts among the relevant prescriptive commitments of the *entire* population,[208] the justification of a law expressing such an output commitment (or a legislative proposal advancing such an output commitment) is thus straightforward: it can be justified directly in terms of the prescriptive input commitments. Conversely, introducing a prescriptive input commitment as a justification of a legislative proposal is unproblematic, since any law arising from such a proposal would be adequate to the uncontroversial popular commitments serving as input commitments.

But where there are no conflicts among the relevant prescriptive commitments of the entire population, there is no fact of pluralism. Difficulties under law of pluralism arise when such conflicts do exist: then the set of relevant prescriptive input commitments is inconsistent, and output commitments can only be justified in terms of a consistent *subset* of that set.

4.5.3 Exclusion of other input commitments

Given the fact of pluralism, introducing a prescriptive input commitment as a justification of a legislative proposal *directly prejudices* the output commitment to be expressed by the law: the legislator introducing the proposal is in effect saying that her prescriptive input commitment (or her subset of prescriptive input commitments) should become law, binding even those who do not hold that prescriptive input commitment (or subset of prescriptive input commitments). A legislative proposal justified in terms of a prescriptive input commitment not shared by the entire population is tantamount to a proposal to *exclude* prescriptive input commitments that conflict with the commitment held by the proposer, since the legislative proposal cannot simultaneously reflect the proposer's prescriptive commitment and conflicting prescriptive commitments. This does not leave much room for *negotiation*, since no *intermediate* legislative commitments are generated in this version of the legislative process: the legislative process jumps directly from input commitments to analogous output commitments, without the articulation of intermediate commitments that is only possible through negotiation.

In this sense, controversial prescriptive input commitments are the true conversation-stopper, regardless of their origin.[209] By introducing a controversial prescriptive popular commitment as an input commitment, and hence as a premise for legislative negotiations that directly prejudices their

[208] Or the subset of the population under consideration; this complication will be discussed in more detail in chapter 6 on "Recursive pluralism."
[209] Cf. Rorty 1999, 171, and p. 78 above.

conclusion, I am effectively bringing the negotiations to an end before they have begun.[210]

Where the set of prescriptive commitments held by a population is inconsistent, we know that the legislative process must come up with *some* justification for excluding certain prescriptive popular commitments from serving as input commitments that can be reflected in the outputted laws, given the need for the laws to be consistent and enforceable. But according to the conception of pluralism, such a justification may not derive from any commitments that are not held by the entire population, in particular not a legislator's commitment to exclude other commitments.[211]

Under law as pluralism, the only justification for excluding a prescriptive popular commitment as an input commitment would be that it leads to an inconsistent or unenforceable output. But from the perspective of *any* individual legislator introducing a legislative proposal, the exclusion of *any* prescriptive popular commitments in conflict with that proposal would be justified, since the inclusion of both the individual legislator's own commitments and those of others would lead to an inconsistent outcome. For the individual legislator, there is no criterion for excluding other prescriptive commitments as input commitments other than that they conflict with the prescriptive commitments of the legislator herself. Given a conflict between her own prescriptive commitments and those of other legislators, the legislator has the choice of excluding either her own commitments, or the commitments of others. Barring altruism and self-sacrifice (and the sacrifice of the commitments of the population the legislator represents), that choice is easily made.

Instead of leaving it up to the individual legislator to justify which prescriptive popular commitments to exclude as input commitments, one could adopt a "bird's eye" perspective on the legislative process and leave it up to the *legislature* as a collective body to justify which prescriptive popular commitments to exclude as input commitments. But what justifications could the legislature invoke in doing so? Invoking controversial prescriptive popular commitments as justifications doesn't do the trick, since this would privilege certain popular commitments over others, thus violating the

[210] Note that this would not necessarily be the case if legislative negotiations are expected to modify the fundamental commitments of legislators and the members of the population they represent; cf. the discussion on p. 70 and in n. 171. But the premise of law as pluralism is that this is not what the legislative process is for. Other parts of the public sphere may be appropriate venues for modifying fundamental commitments, however, which is why the conclusions drawn here are restricted to the legislative process. See also the discussion in section 7.4 on "The public sphere as generator of popular commitments" below.

[211] There is one exception to this rule: the *commitment to pluralism* itself. The commitment to pluralism might conceivably be invoked to exclude popular commitments from serving as input commitments, given that the commitment to pluralism is "built into" law as pluralism and is *always valid* under law as pluralism even if it is not shared by the entire population. But for the purpose of excluding some prescriptive input commitments as opposed to others, the commitment to pluralism does us little good, since it is neutral with respect to the content of such prescriptive input commitments. It provides no substantive justification for excluding some prescriptive input commitments while including others, other than the threat of inconsistent or unenforceable output norms.

conception of pluralism.[212] The only escape route would appear to be for the legislature to take a vote: but then the voting behavior of the individual legislators would be determined by their respective prescriptive commitments, which means that – regardless of the precise modality for determining the outcome of a vote[213] – the outcome of the vote would *arbitrarily* exclude some popular commitments and include others, in the sense that the configuration of voting strengths within a legislature is an arbitrary, contingent matter: under the conception of pluralism, popular commitments should not be excluded simply because they fail to garner the required majority in a vote.[214] And in any event, a vote does not constitute a *justification*, other than in terms of the controversial justificatory principle that (numeric) might makes right.[215]

Whether justification for excluding certain prescriptive popular commitments as input commitments is left to individual legislators introducing and defending proposals or to the legislature as a whole, there are no non-arbitrary criteria for justifying the exclusion of some prescriptive popular commitments as input commitments in favor of others. Under law of pluralism, there are accordingly only two possibilities: either no prescriptive popular commitments would be excluded as input commitments, or all conflicting prescriptive popular commitments would be excluded. But if no prescriptive popular commitments were to be excluded as input commitments, we would be back to law as relativism: it would be impossible to generate consistent and enforceable laws.

4.5.4 First component of the justificatory constraint

Under law as pluralism, the only prescriptive popular commitments[216] that can serve as input commitments and hence as justifications for legislative proposals (and the laws to which they give rise), and thus also for positions taken in legislatures in the defense of such proposals, are those that are *held by the entire population*.[217] Law as pluralism excludes *all* prescriptive popular commitments as input commitments and hence as justifications in the pluralistic legislative process, unless those prescriptive popular commitments

[212] Invoking the commitment to pluralism itself does not provide substantive justification for the legislature taken as a whole any more than it does for individual legislators: it merely stipulates that the laws outputted must be consistent and enforceable, but it does not differentiate in terms of the content of the input commitments that may lead to such inconsistent or unenforceable laws.
[213] Say, according to the applicable majority or supermajority rule.
[214] As Tribe and Dorf 1991, 105, point out with respect to coercive laws that enshrine the commitments of the majority: "[S]uch laws do not 'impose' anything on the majority. These laws are impositions only for those in the minority who disagree with the policies that underlie them, for it is only their liberty that is in any meaningful sense curtailed."
[215] Cf. Thucydides 431 BC, book V, chapter XVII: "Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must." The goal of law as pluralism is to generate legislation that is adequate to the fundamental commitments of the (numerically) strong *and* the weak.
[216] Other than the commitment to pluralism; but as pointed out in n. 211 above, the commitment to pluralism plays little role in legislative negotiations other than as embodied in the rules that constrain the legislative process.
[217] As we shall see in section 6 on "Recursive pluralism" below, this should read more precisely "held by the entire subset of the population in the respective legislative jurisdiction."

are uncontroversial.[218] This is the first component of the justificatory constraint of law as pluralism, which relates to *prescriptive* popular commitments offered as input commitments.

It is now trivial to see how this component of the justificatory constraint of law as pluralism implements the regulative ideal of law as pluralism. Under the regulative ideal of law as pluralism, there is a presumption against changing the behavior of members of the population by way of laws, if the laws express commitments that are incompatible with the fundamental commitments that otherwise would guide the behavior of those members. Laws justified solely in terms of prescriptive commitments held by the entire population would not change the behavior of the members of the population *at all* (provided that their behavior is in fact guided by their commitments), hence those laws are fully compatible with the regulative ideal of law as pluralism.

4.6 Justification in terms of descriptive input commitments

This would appear to provide only a very thin basis for legislative negotiations. How can legislative proposals be justified if the only prescriptive commitments that can serve as input commitments and hence as justifications must be held by the entire population? How, under these conditions, should a legislature generate laws in fields where the fundamental commitments of the population conflict with each other, such as abortion, euthanasia, stem cell research, gay marriage, polygamy, religious architecture, the head apparel of female Muslim basketball players, and other issues that at least some members of the population believe to be of fundamental importance? Should the legislature simply give up, thus privileging the status quo, whatever that status quo may happen to be?

Privileging the status quo would violate the regulative ideal of law as pluralism, however: the status quo always privileges certain fundamental commitments over others, and law as pluralism would appear to require that the terms of such privileging must be renegotiable through the legislative process in principle – the only privileging permissible under law as pluralism is that which ensures consistency and enforceability of the outputted laws. Although it remains to be seen whether a legislature *at a given level* should in fact have the competence to adopt binding output commitments in any given field,[219] law as pluralism should provide some means, at some level, to adopt or amend laws that concern any subject matter in principle.

Fortunately, not all input commitments are *prescriptive*; some are *descriptive*. As we shall see in this subsection, the concerns discussed in the previous section regarding justification in terms of prescriptive input commitments do not apply in the same way to justification in terms of descriptive input commitments, thus opening up a door to legislative negotiations that would be closed if *all* controversial popular commitments, not just controversial prescriptive popular commitments, were excluded as input commitments and hence as potential justifications for legislative proposals and laws.

[218] Except, as usual, the commitment to pluralism.
[219] See the discussion in chapter 6 on "Recursive pluralism" below.

4.6.1 Grammatical form of descriptive commitments

What is the salient difference between prescriptive input commitments and descriptive input commitments? To begin with, the fundamental grammatical form of statements expressing descriptive input commitments is *not* analogous to the fundamental grammatical form of statements expressing (prescriptive) output commitments. In the simplest case, statements expressing descriptive input commitments are of the grammatical form "Y is P," where Y is a *thing* of some sort, and P is a property of that thing. "Thing" is meant in the broadest possible sense: a thing may be a tangible or intangible object, a natural or non-natural person, a relationship, a sense impression, an abstraction (such as a mathematical or physical entity), or most generally: anything that can be followed by the copula "to be" in its indicative mood.[220] The copula in conjunction with the property P is a *predicate* of that thing, or in common parlance: a *description* of that thing.

As was the case for statements expressing prescriptive commitments, this simplest form of a statement expressing a descriptive commitment can be extended and refined: most obviously by choosing a copula other than "to be" in its indicative mood, such as "Y seems P," "Y becomes P," "Y looks P," etc., or also copulas modified by modal verbs such as "Y would be P" or "Y will be P," and so on. Alternately, descriptive statements may do without a copula altogether and take the form "Y ∏," where ∏ is a predicate without a copula, as in "methane emissions cause global warming" or "deficit spending stimulates the economy." The simplest form, "Y is P," however, captures all that is essential about statements expressing descriptive commitments for our purposes, and it is claimed without further argument that all descriptive statements can, without significant loss of information, be reduced to the paradigmatic form "Y is P."[221]

The main stipulation for our purposes is that the predicate of a descriptive statement not itself *constitute a guide for human conduct*. While the statement "incest is prohibited" superficially has the grammatical form "Y is P," it has prescriptive force, since "is prohibited" constitutes a guide for human conduct. "Incest is prohibited" should thus be unpacked as "thou shalt not engage in incest" or "persons may not engage in incest" or the like.[222]

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[220] Note that the simplest form of descriptive statements presented here, "Y is P," is not unambiguously available in all languages (for instance in zero-copula languages such as Ancient Greek, Russian, and Semitic languages, or languages with multiple "be-words" such as Spanish, Portuguese, Japanese, Korean, and so on), but some form of a simple "thing-predicate" relationship statement can be found in all human languages.

[221] E.g., "Y seems P" is equivalent to "Y is P-seeming," "Y becomes P" is equivalent to "Y is P-becoming," and so on. Similarly, "Y would be P" is equivalent to "Y is P-in-another-possible-world," "Y will be P" is equivalent to "Y is P-in-the-future," and so on. Similarly, descriptive statements that omit copulas altogether, such as "CO_2 emissions cause global warming," can be reformulated as "CO_2 emissions are global-warming-causing" or the like. Note that this transformation also works for descriptive statements that are not commonly considered descriptive, such as "the spotted owl should not go extinct," which can be transformed into the descriptive (but appraisive!) statement "the spotted owl is worthy-of-not-going-extinct."

[222] Abusing the classical Chomskyan model, one might say that the statement's "deep structure" is prescriptive, while its "surface structure" is descriptive. See Chomsky 1957 for the classical presentation of this model.

By contrast, and crucially for this analysis, "incest is an abomination" and "incest is against the will of God" are *descriptive* statements expressing *descriptive* commitments. While the predicates "to be an abomination" and "to be against the will of God" *suggest* a guide for human conduct (namely, persons should not engage in incest), they do not *constitute* a guide for human conduct – one can acknowledge the (descriptive) commitment "incest is against the will of God" and the (prescriptive) commitment "one should engage in incest at every opportunity" without inconsistency. Note, however, that an inconsistency does arise if, in addition to these commitments, one simultaneously acknowledges the (prescriptive) commitment, "one should never engage in acts that are against the will of God." In that case, one of the prescriptive commitments has to be excluded in order to avoid the inconsistency – but the descriptive commitment need not be excluded.

4.6.2 Gap between input and output commitments

The form of statements expressing descriptive input commitments (when properly unpacked), namely "Y [copula] P" is not the same as the form of statements expressing legislative output commitments, namely "X [deontic modal verb] A," and there is no straightforward way in which the former type of statement can be mapped onto the latter type of statement. Descriptive commitments accordingly do not map directly onto (prescriptive) output commitments – it is not immediately obvious what laws can be derived from descriptive input commitments, unless, as in the example of incest above, the input commitments also include commitments with *prescriptive* force.

This is even true if we imagine the legislature consisting of a single legislator: the legislator may hold a set of descriptive input commitments, but this set does not *entail* any given law, and it is not *sufficient* to generate the relevant output commitments (which, as discussed in section 3.2 on "Popular commitments and legislative commitments" above, are predominantly prescriptive). In order to get from the (descriptive) input commitments to the (prescriptive) output commitments, even in a legislature of one, additional *prescriptive* commitments would be needed. Given the descriptive commitments held by the legislator (or the population the legislator represents), the legislator would not be *entitled* to hold any given output commitment to the exclusion of another, at least not without acknowledging additional, prescriptive commitments.

There is, accordingly, a *gap* between descriptive input commitments and prescriptive output commitments. This gap opens up space for justification in terms of descriptive input commitments that is not available to justification in terms of prescriptive input commitments: even given the fact of pluralism and hence the inconsistent nature of the fundamental commitments held by a population, introducing a *descriptive* input commitment as a justification of a legislative proposal *does not* directly prejudice the output commitment to be expressed by the law. By introducing a proposal justified in terms of a descriptive input commitment, as opposed to a proposal justified in terms of a prescriptive input commitment, the legislator is not saying that her *descriptive* commitment should become law, since descriptive commitments can never

become law – at least not without conjoined prescriptive commitments. Descriptive input commitments do not guide human conduct, hence they cannot serve as the sole basis of law.

4.6.3 No exclusion of other input commitments

Crucially, unlike a legislative proposal justified in terms of prescriptive input commitments not shared by the entire population, a legislative proposal justified in terms of *descriptive* input commitments not shared by the entire population is *not* tantamount to a proposal to exclude descriptive input commitments that conflict with the commitments held by the proposer, since *output commitments that reflect inconsistent descriptive input commitments are not necessarily inconsistent themselves.*

Consider an example. Say that one subset of the population (call it TCM) consists of advocates of traditional Chinese medicine. TCM holds the descriptive commitment $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" (which may either be fundamental itself or subsidiary, i.e., derived from fundamental commitments).[223] In our symbolic notation:

H (TCM, $DESC^{TCM}$).

Say that another subset of the population, NTCM, holds the (incompatible) descriptive commitment $*DESC^{TCM}$ "acupuncture is *not* an effective remedy against allergies," or in our symbolic notation:

H (NTCM, $*DESC^{TCM}$).

Say also that subset TCM holds the prescriptive commitment $PRSC^{TCM}$ "health insurers ought to pay for acupuncture treatment of allergies," while subset NTCM holds the (incompatible) prescriptive commitment $*PRSC^{TCM}$ "health insurers ought *not* to pay for acupuncture treatment of allergies." In symbolic notation:

H (TCM, $PRSC^{TCM}$) and

H (NTCM, $*PRSC^{TCM}$).

Note that there is *no* (relevant) law expressing a legislative output commitment OUT that reflects both prescriptive commitments $PRSC^{TCM}$ and $*PRSC^{TCM}$. Asserting either $PRSC^{TCM}$ or $*PRSC^{TCM}$ as a justification for a legislative proposal excludes the other, incompatible prescriptive commitment. How about asserting either of the descriptive commitments $DESC^{TCM}$ or $*DESC^{TCM}$? If there is a law expressing an output commitment OUT that reflects *both* $DESC^{TCM}$ and $*DESC^{TCM}$, then asserting either of these descriptive commitments does not exclude the other. Is there such a law?

[223] In the symbolic notation used in this paper, the superscript of a commitment denotes the individual or subset of the population that holds the commitment; the subscript of a commitment, if any, further specifies the content of the commitment, especially where more than one commitment is held by the same individual or subset of the population.

Trivially, a great number of laws are *compatible* with both $DESC^{TCM}$ and $*DESC^{TCM}$, even an unrelated law such as "green beans may only be harvested on Fridays." There is certainly no contradiction between a law regulating the harvest of green beans and any descriptive commitment regarding the effectiveness of acupuncture. But such a law would not be *derived* from either of those descriptive commitments in any substantive sense, and that is was it means for a law (or more precisely, the output commitments expressed by that law) to *reflect* a commitment, as defined in section 3.1 above:[224] one commitment reflects another commitment if it is compatible with that commitment and is derivable from it. A commitment is derivable from another commitment if it can be justified (at least in part) by that commitment: harvesting rules cannot be justified, either through committive or permissive inference, in terms of beliefs about acupuncture.

So what law might *reflect* both $DESC^{TCM}$ and $*DESC^{TCM}$? For instance, the law expressing the commitment OUT_1 "allergy sufferers may use acupuncture at their own expense." OUT_1 can be justified in terms of $DESC^{TCM}$:

"*Because* acupuncture is an effective remedy against allergies, allergy sufferers may use acupuncture at their own expense."

OUT_1 can also be justified in terms of $*DESC^{TCM}$, even though $*DESC^{TCM}$ is incompatible with $DESC^{TCM}$:

"*Because* acupuncture is not an effective remedy against allergies, allergy sufferers may use acupuncture at their own expense."

Note that both of these justifications are by *permissive* inference; someone or something (in this case a legislature L) committed to the descriptive commitment $DESC^{TCM}$ or $*DESC^{TCM}$ is not necessarily also committed to the legislative commitment OUT_1, but is entitled to be so committed.[225] In symbolic notation:

$H (L, DESC^{TCM}) \succ H (L, OUT_1)$ and $H (L, *DESC^{TCM}) \succ H (L, OUT_1)$.

Note that there is no problem that the legislature L simultaneously holds both of these mutually incompatible descriptive commitments – they are only legislative *input* commitments (or perhaps also intermediate legislative commitments), but not *output* commitments. The set of input commitments (and the set of intermediate commitments) may be inconsistent; only the set of output commitments must be consistent. In this case, the set of output commitments is merely $\{OUT_1\}$, which trivially is consistent. Since all of these commitments are legislative, we can simplify the notation as follows:

[224] See especially n. 117 on p. 51 concerning the *substantive* connection required also for permissive inferences.

[225] Note that both of these inferences are also lacking an additional premise, but we shall assume that this omitted premise is uncontroversial (say: "allergy sufferers ought to be able to use any sort of remedy, whether effective or ineffective, at their own expense"). This complication will be discussed in more detail below in section 5.4 on "Deriving output commitments from conflicting descriptive input commitments."

$DESC^{TCM} \succ OUT_1$ and $*DESC^{TCM} \succ OUT_1$.

So OUT_1 is compatible with and derivable from each of the mutually incompatible input commitments $DESC^{TCM}$ and $*DESC^{TCM}$. Subset TCM of the population will emphasize the first phrase of OUT_1, "allergy sufferers may use acupuncture," while subset NTCM will emphasize the second phrase of OUT_1, "(but only) at their own expense." Regardless of these differences in emphasis, OUT_1 reflects both $DESC^{TCM}$ and $*DESC^{TCM}$, hence asserting either $DESC^{TCM}$ or $*DESC^{TCM}$ does not exclude the other descriptive commitment.

There are, of course, other laws expressing other legislative commitments that reflect both $DESC^{TCM}$ and $*DESC^{TCM}$. For instance OUT_2, "health insurers shall cover the costs of acupuncture for the treatment of allergies, but only up to a threshold of 250 euros a year," or OUT_3, "practitioners of acupuncture shall require a license issued by the national medical board." The laws justified in terms of descriptive input commitments (and in particular mutually incompatible descriptive input commitments) are not necessarily unique; there may be a wide range of laws reflecting a given set of descriptive input commitments. All of these legislative output commitments OUT_1, OUT_2 and OUT_3, as well as countless others, can be justified in terms of each of the two mutually incompatible descriptive input commitments $DESC^{TCM}$ and $*DESC^{TCM}$. All of these laws reflect the inconsistent set of descriptive input commitments without being inconsistent themselves.

4.6.4 Second component of the justificatory constraint

This feature of descriptive input commitments gives us the second component of the justificatory constraint of law as pluralism: Under law as pluralism, *all* descriptive popular commitments may serve as input commitments and hence as justifications for legislative proposals (and the laws to which they give rise), and accordingly also for positions taken in legislatures in the defense of such proposals. Thus, for a given subset of the population X, a given legislature L, and a given descriptive popular commitment DESC held by X:

H (X, DESC) $\succ$ H (L, DESC).

How does this second component of the justificatory constraint of law as pluralism implement the regulative ideal of law as pluralism? Under the regulative ideal of law as pluralism, laws – which express legislative output commitments – should prima facie only bind members of the population whose fundamental commitments do not conflict with the legislative output commitments expressed by those laws. Now, a given law justified in terms of descriptive input commitments may very well end up conflicting with the *prescriptive* commitments held by a given member of the population – the law expressing OUT_2 ("health insurers shall cover the costs of acupuncture for the treatment of allergies, but only up to a threshold of 250 euros a year"), for instance, conflicts (partially) with both $PRSC^{TCM}$ ("health insurers ought to pay for acupuncture treatment of allergies") and $*PRSC^{TCM}$ ("health insurers ought not to pay for acupuncture treatment of allergies"). But any law fulfilling the second component of the justificatory constraint of law as pluralism at least

potentially reflects the *descriptive* commitments of all members of the population.[226] There is nothing about the second component of the justificatory constraint of law as pluralism that results in laws binding members of the population whose *descriptive* fundamental commitments conflict with the output commitments expressed by the laws. The fact that laws fulfilling the second component of the justificatory constraint of law as pluralism may conflict with some *prescriptive* fundamental commitments held by members of the population is what distinguishes pluralism from relativism: while no prescriptive fundamental commitments are privileged prima facie, some may end up conflicting with the legislative commitments while others do not, in the interest of achieving legislation that is both adequate (at least to all descriptive popular commitments and uncontroversial prescriptive popular commitments) as well as consistent and enforceable.

4.7 Defining the justificatory constraint

In the previous subsection, we showed that the entitlement relationship that obtains for descriptive popular commitments

H (X, DESC) ➢ H (L, DESC)

does not generally obtain for prescriptive popular commitments; instead, a prescriptive popular commitment PRSC may only serve as an input commitment if no subset of the population holds a prescriptive commitment incompatible with PRSC. Hence, for subsets of the population X and Y:

(H (X, PRSC) & ∃ Y (H (Y, *PRSC))) / H (L, PRSC) but

(H (X, PRSC) & ~∃ Y (H (Y, *PRSC))) ➢ H (L, PRSC).

Taken together, the two components of the justificatory constraint of pluralism developed in subsections 4.5.4 and 4.6.4 give us the following complete formulation of the **justificatory constraint of law as pluralism**:

> Under law as pluralism, a popular commitment may serve as an input commitment and hence as a justification for legislative proposals and the laws to which they give rise, and accordingly also for positions taken in legislatures in the defense of such proposals, if that popular commitment is (a) *descriptive*, or (b) *prescriptive and held by the entire population*.[227]

[226] At least to the extent they have been asserted as justifications during the legislative process and have succeeded in being reflected by the relevant output commitments. What the chances of success are will become clearer in chapter 5 on "Decomposing and synthesizing commitments."

[227] Again more precisely: "prescriptive and held by the entire subset of the population in the legislative jurisdiction in which the legislation is adopted"; this qualification will be discussed in more detail in chapter 6 on "Recursive pluralism." Note that the *commitment to pluralism* may also serve as an input commitment, because it is already "built into" the pluralistic legislative process. But in general, the commitment to pluralism does little work in the *justification* of laws; it does most of its work in the form of the justificatory constraint of law as pluralism itself.

Symbolically:

H (X, DESC) ➢ H (L, DESC),

(H (X, PRSC) & ∃ Y (H (Y, *PRSC))) / H (L, PRSC),

(H (X, PRSC) & ~∃ Y (H (Y, *PRSC))) ➢ H (L, PRSC).

The justificatory constraint of law as pluralism delivers on the promise made in section 3.2 on "Popular commitments and legislative commitments," namely to draw the line between popular commitments that may serve as justifications for laws and those that may not: descriptive popular commitments and uncontroversial prescriptive popular commitments are okay, while controversial prescriptive popular commitments are not.

Informally speaking, this means that only uncontroversial *oughts* may be imported from the greater public sphere into the legislative process – controversial *oughts* are left at the doorstep of the legislative chamber. In contrast, all *ises* may be imported into the legislative process, regardless of whether they are controversial or not. Now the legislature's job is to generate *oughts* that are binding on the entire population subject to the legislature's jurisdiction; it constructs these *oughts* solely out of the *ises* and uncontroversial *oughts* that have been imported from the public sphere.[228]

4.7.1 Separation of law and morality?

Does this mean that controversial prescriptive fundamental commitments held by members of a population are *irrelevant* to the justification of laws, and hence that the prescriptive commitments embodied in laws bear no relationship to the population's prescriptive fundamental commitments to the extent they are controversial? In other words, is law of pluralism an extreme form of legal positivism, in which there is no normative connection between law and morality (or other forms of controversial prescriptive fundamental commitments)?[229]

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[228] Along with any controversial *oughts* whose controversy is not rooted in fundamental commitments – but this is not the concern of law as pluralism or of this paper.

[229] As mentioned in n. 33 on p. 14 above, law as pluralism is not so interested in the analytical or conceptual question of *what the law is*, but rather in the normative question of *what lawmaking ought to be* under conditions of conflicting fundamental commitments. So law as pluralism is in principle compatible with any analytical theory of *what the law is*, including the exclusive legal positivism of Hart 1994, Raz 1994 or Marmor 1997 (for a general discussion of exclusive legal positivism, see Marmor 2002), the inclusive legal positivism of Coleman 2001 (for a general discussion of inclusive legal positive, see Himma 2002), the interpretivism of Dworkin 1986, or even the classical or modern traditions of natural law (see Finnis 2002 and Bix 2002). Of course, to the extent that law as pluralism focuses primarily on the *process* of legislating as opposed to the *content* of legislation, the "separation thesis" or "separability thesis" of exclusive legal positivism lends itself readily to an analysis of law as pluralism. But the question at issue in this subsection is whether law as pluralism constitutes an *extreme* form of legal positivism, in which law and morality are entirely separate, as caricatured for instance by Fuller 1958.

Not necessarily – the justificatory constraint of law as pluralism is merely a constraint on the *justification*, not on the *content* of the laws (and the proposals resulting in those laws). The content of a law may very well reflect certain controversial prescriptive fundamental commitments of a population, as long as the content of the law is justified in the right way (i.e., according to the justificatory constraint of law as pluralism). Given that adequate laws must be consistent, they are likely to reflect some of the prescriptive fundamental commitments of the population they bind and not others. With respect to the prescriptive fundamental commitments they do reflect, there is a normative connection between law and morality (or other forms of controversial prescriptive fundamental commitments).

What is positivistic about law as pluralism is merely that there is no *prima facie* connection of that sort. No *particular* prescriptive fundamental commitment is more likely to be reflected in a law under law as pluralism than any other particular prescriptive fundamental commitments.[230] There is no *presupposition* in favor of one set of prescriptive fundamental commitments over any other set. The connection between law and morality is *contingent* upon the way the pluralistic legislative process in fact pans out, given a particular constellation of fundamental commitments in the population. There is no *necessary* connection between any particular system of morality and the laws that bind a population.

Given that controversial prescriptive fundamental commitments cannot serve as justifications under law as pluralism, is there nevertheless a way they can be "smuggled into"[231] the legislative process? As long as they can be smuggled in subject to the justificatory constraint of law as pluralism, smuggling them in is not necessarily a bad thing.[232] Smuggling such commitments in may in fact tighten the connection between laws and the population's prescriptive fundamental commitments, thus making law as pluralism less "positivistic" and more responsive to moral and other prescriptive concerns.[233]

The preceding discussion suggests how to smuggle prescriptive fundamental commitments into the legislative process: by translating them into descriptive input commitments that can be used as justifications under law as pluralism. How this can be done (and the limits to doing so) is discussed in the following chapter on "Decomposing and synthesizing commitments."

[230] Except for the commitment to pluralism, which is "built into" the legislative process and in particular into the justificatory constraint of law as pluralism.
[231] A major theme of Smith 2010, who argues that moral notions inadmissible under the constraint of public justification are (and indeed should be) smuggled into political and legal discourse.
[232] Some members of the population might believe that such commitments should not be smuggled in, but that belief would be a prescriptive fundamental commitment that cannot be used as a justification during legislative negotiations – or as part of the specification of the justificatory constraint.
[233] And hence perhaps more legitimate, but this goes beyond the scope of the paper's discussion.

5 Decomposing and synthesizing commitments

5.1 Decomposing prescriptive commitments

Does it even make sense to speak of *translating* prescriptive commitments into descriptive commitments? The gap between *is* and *ought* would seem to indicate that descriptive commitments (and the descriptive statements that express them) and prescriptive commitments (and the descriptive statements that express them) are two distinct species: Hume's guillotine[234] would seem to cut off the possibility of deriving an ought-statement from an is-statement, at least straightforwardly and without engaging in considerable philosophical controversy.[235]

Be that as it may, the challenge here is not to derive ought-statements from is-statements, but rather to move in the opposite direction: how, given a prescriptive (ought-)statement, can we derive a descriptive (is-)statement that captures at least the most salient features of what we are trying to say with the prescriptive statement? For this is the essence of translation: trying one's best to express in the target language (in this case, the language of descriptive statements) what was expressed more completely in the source language (in this case, the language of prescriptive statements).

The intuition behind this translation process from prescriptive statements into descriptive statements is that any prescriptive commitment PRSC can be split up into a descriptive commitment DESC and a prescriptive "linking" commitment LINK, which captures the prescriptive aspect or force of the prescriptive commitment PRSC expressed by the original prescriptive statement. This translation or **decomposition** process can be represented symbolically as:

PRSC ➢ DESC & LINK

In other words, if I hold the prescriptive commitment PRSC, I am entitled to hold the descriptive commitment DESC and the (prescriptive) linking commitment LINK, which captures the prescriptive force of PRSC.[236]

DESC and LINK need not be unique for any given PRSC. For instance, the prescriptive commitment PRSC "brides ought to wear white" can be split up into a descriptive commitment $DESC_1$ "typical brides wear white" and the linking commitment $LINK_1$ "brides ought to wear what typical brides wear." But PRSC can also be split up into a descriptive commitment $DESC_2$ "brides who wear white are taken more seriously than brides who wear other colors"

[234] Black 1964, 166.
[235] Not that such controversy has ever been avoided, at least not by philosophers. Admirable attempts to bridge the gap from *is* to *ought* have been made by Black 1964, Searle 1964, Searle 1969, 175-198, and Searle 1995 (using speech acts and institutional facts as a springboard from *is* to *ought*), MacIntyre 2007 (arguing that the derivation is rooted in our cultural DNA, so to speak), and Hampshire 1989 (like MacIntyre, pursuing an Aristotelian line of thought).
[236] Note that linking commitments are *always* prescriptive; hence, only the simplified term "linking commitment" instead of the term "prescriptive linking commitment" will be used from this point forward.

and a linking commitment $LINK_2$ "brides should aim to be taken as seriously as possible."

How does this work with prescriptive fundamental commitments that a legislator might want to "smuggle into" the legislative process? I.e., how can a legislator translate a prescriptive fundamental commitment that cannot serve as an input commitment and hence cannot be used as a justification under the justificatory constraint of law as pluralism into a descriptive commitment that can serve as an input commitment and hence can be used as a justification under the justificatory constraint of law as pluralism? As an example, consider the prescriptive popular commitment (which may be either fundamental or subsidiary) $PRSC^V$ held by subset V of the population: "Women ought to wear veils in public."

There are many different ways to separate out a descriptive commitment from this prescriptive commitment, depending in part on the reasons why the legislator holds the prescriptive commitment and the legislator's motivation for smuggling it into the legislative process. If the legislator holds the prescriptive commitment because it has been ordained by God, and because the legislator believes it is important for God's will to be reflected in legislation, a corresponding descriptive commitment $DESC^V_1$ might be, for instance, "God has ordained that women ought to wear veils in public." If the legislator holds the prescriptive commitment because it is based on tradition, and the legislator believes it is important for legislation to reflect tradition, a corresponding descriptive commitment $DESC^V_2$ might be "traditionally, women have always worn veils in public." And if the legislator believes $PRSC^V$ to be true because it is the most cost-efficient way to protect women from the unwanted advances of men, and the legislator believes it important for legislation to protect women in that way, a corresponding descriptive commitment $DESC^V_3$ might be "wearing veils in public is the most cost-efficient way to protect women from the unwanted advances of men."

None of these descriptive commitments fully capture what the legislator is committed to by holding $PRSC^V$. There is indeed no way they could: descriptive commitments can never fully correspond to prescriptive commitments, given the difference in force between (prescriptive) *ought* and (descriptive) *is*, or between the corresponding deontic modal verbs and the corresponding descriptive copula. In order to fully reflect the prescriptive commitments from which they derive, descriptive commitments must be supplemented by linking commitments that restore the prescriptive force of the original prescriptive commitment, in our case $PRSC^V$: for instance, the descriptive commitment $DESC^V_1$ "God has ordained that women ought to wear veils in public" must be supplemented by the linking commitment $LINK^V_1$ "all persons must do what God has ordained" in order to have the same force as $PRSC^V$. The descriptive commitment $DESC^V_2$ "traditionally, women have always worn veils in public" must be supplemented by the linking commitment $LINK^V_2$ "traditions must be continued in the future." And the descriptive commitment $DESC^V_3$ "wearing veils in public is the most cost-efficient way to protect women from the unwanted advances of men" must be supplemented by $LINK^V_3$ "women must be protected from the unwanted advances of men as cost-efficiently as possible."

By translating a prescriptive commitment such as $PRSC^V$ into a descriptive commitment, something is always lost in translation. The translation from a prescriptive commitment PRSC into a descriptive commitment DESC strips away the prescriptive force of the statement – a prescriptive force which is captured by the linking commitment, LINK. LINK is what is lost in translation from PRSC to DESC.

And something may very well be lost in *decomposition* as well. Only if

DESC & LINK → PRSC

is nothing lost. In general,

PRSC ➢ DESC & LINK but ~(DESC & LINK → PRSC).

Many decompositions of PRSC to which the holder of PRSC is entitled do not fully capture what the holder is committed to by holding PRSC. The challenge for a legislator holding a given prescriptive commitment PRSC is to find a descriptive commitment DESC that captures as much as possible of what PRSC commits one to, while keeping the "stripped away" prescriptive component, LINK, to a minimum. According to the justificatory constraint of law as pluralism, DESC may serve as input to the legislative process, while LINK in general may not (unless of course it is uncontroversial[237]). It may therefore be in the interest of the legislator (and the members of the population the legislator represents) to maximize the content of DESC while minimizing the content of LINK. The precise way in which the legislator splits up PRSC into DESC and LINK depends on the structure of the legislator's beliefs and values – e.g. what *other* commitments the legislator holds, and *why* the legislator holds the commitments he or she holds – as well as the legislator's goals in contributing the descriptive commitment (and any uncontroversial linking commitments) to the legislative process. The legislator's success in smuggling in the descriptive translation of a prescriptive justification PRSC will depend on the legislator's skill in splitting up PRSC into DESC and LINK.

We will return to this question of legislative skill once we have considered how to derive laws (or rather the output commitments expressed by those laws) from input commitments, the topic of the following sections.

5.2 Deriving output commitments from input commitments

5.2.1 The role of intermediate commitments

Recall the distinction between popular commitments and legislative commitments made in section 3.2: popular commitments are fundamental commitments (or subsidiary commitments derived from fundamental commitments) held by members of the population and the legislators who represent them; legislative commitments are pragmatic commitments held by

[237] This will be a key point in subsection 5.3.1 on "Synthesizing prescriptive commitments" below.

the legislature that arise through the legislative process. Popular commitments may, subject to the justificatory constraint of law as pluralism, serve as input commitments to the legislative process; legislative (output) commitments are expressed by the laws outputted by the legislative process (and thereby endorsed by the legislature).

Laws expressing legislative output commitments are derived from popular commitments serving as input commitments by being justified in terms of those commitments. Laws derived from popular commitments serving as input commitments *reflect* those popular commitments and are thus *adequate* to them. But this justification is seldom direct; it is seldom the case that, given a popular commitment serving as an input commitment INP and a law expressing an output commitment OUT, [238]

$INP \rightarrow OUT$ or even $INP \succ OUT$

without intermediate steps. Similarly, a *set* of popular commitments serving as the set of input commitments to the legislative process, $\Sigma INP = \{INP_1, INP_2, \ldots INP_n\}$ generally only justifies a set of output commitments $\Sigma OUT = \{OUT_1, OUT_2, \ldots OUT_m\}$ by way of a set of intermediate legislative commitments $\Sigma INT = \{INT_1, INT_2, \ldots INT_k\}$, which in turn are justified in terms of the set of popular commitments serving as input commitments:

$\Sigma INP \succ \Sigma INT \succ \Sigma OUT$.

Note that while the set of input commitments is in general inconsistent (because the descriptive popular commitments serving as input commitments are in general controversial), and while the set of output commitments *must* be consistent in order to ensure consistent legislation, the set of intermediate commitments may be either consistent or inconsistent. If the set of intermediate commitments is in fact inconsistent, the legislature is thus entitled to *hold* the set of intermediate commitments, but not to *endorse* it.

What, exactly, do intermediate commitments represent within the legislative process? They represent all the commitments held by the legislature that are not input commitments themselves, but are justified in terms of input commitments, and have not (yet) been endorsed by the legislature as an output commitment to be expressed by a law. In particular, *proposals* for output commitments made by legislators during the legislative process are one species of intermediate commitment.[239] But intermediate commitments

[238] In the following, "popular commitments serving as input commitments" will in general be referred to simply as "input commitments," even where we speak of a *legislator* holding an input commitment. Properly speaking, a legislator can only hold a popular commitment serving as an input commitment, while only a legislature can hold an input commitment; but as long as it is kept in mind *who* or *what* does the holding, this distinction is excessively nitpicky. Popular commitments serving as input commitments are the hinge, so to speak, between popular commitments and legislative commitments.

[239] Note that input commitments themselves may only serve as proposals for output commitments if they are prescriptive; this means that they must be uncontroversial and hence admissible under the justificatory constraint of law as pluralism. In the general case of *conflicting* popular commitments, input commitments cannot serve directly as proposals for output commitments – instead, intermediate commitments derived from input commitments are necessary for that purpose.

also include any preliminary conclusions drawn by legislators (and hence by the legislature) from the set of input commitments during the legislative process – including conclusions that can *only* be drawn once the legislative process has commenced. For instance, a conclusion that can only be drawn from the conjunction of two separate input commitments contributed by *distinct* subsets of the population (who, prior to the negotiations, might not even have been aware of the existence of the other commitment) could not have been offered as an input commitment itself – it can only be generated *during* the legislative process. Such an intermediate conclusion need not constitute a proposal for an output commitment – it might be used simply as a basis for further negotiations.[240]

Note that in practice, output commitments are not justified only in terms of sets of popular commitments serving as input commitments; they are also justified in terms of other legislative commitments the legislature has already endorsed, paradigmatically the output commitments expressed in laws already adopted.[241] These output commitments already endorsed also serve as input commitments to the legislative process. Given a set of output commitments ΣOUT already endorsed by the legislature, the legislative process thus looks like this:

H (P, ΣPOP) & E (L, ΣOUT) ➢ H (L, ΣINP) ➢ H (L, ΣINT) ➢ E (L, ΣOUT').

I.e., given the set of popular commitments held by population P and the set of output commitments ΣOUT the legislature has already endorsed, the legislature is entitled to hold a set of input commitments ΣINP consisting of the admissible popular commitments and the legislative commitments already endorsed; from this set, the legislature derives a set of intermediate commitments ΣINT it is entitled to hold. This set of intermediate commitments in turn entitles the legislature to generate a new set of output commitments ΣOUT' which it may endorse.

5.2.2 Keeping two sets of books on the legislative process

Now consider this legislative process from the standpoint of individual legislators within the legislative process. Individual legislators (and the members of the population they represent) do not necessarily *hold* or *endorse* (the popular commitment with the same content as) any given legislative commitment (whether an input commitment or intermediate commitment simply held by the legislature during the legislative process or a commitment already endorsed by the legislature) – but they may use the fact that the legislature holds such a commitment when justifying proposals for further legislative commitments. Given a set of legislative commitments, each legislator is free to infer what further commitments the legislature is committed or entitled to hold. Once the legislature holds a legislative commitment, it thereby becomes available to legislators as a justification for

[240] An example of such an intermediate commitment will be explored in section 5.4.3 "Derivation using identical linking commitments" below.
[241] This will be a crucial point when considering the *integrity* of law as pluralism in section 7.1 on "Making justification explicit" below.

further legislative commitments. So while, for a given legislator X, a legislature L, and a given legislative commitment LC, it may be the case that

~H (X, LC)

and hence that X will not use LC as a premise in her justifications, X may nevertheless make arguments of the following sort, for a given subset of input commitments ΣINP held by X and a given set of legislative commitments ΣLC held by L:

H (X, ΣINP) & H (L, ΣLC) ➢ H (L, ΣINT) or even

H (X, ΣINP) & H (L, ΣLC) → H (L, ΣINT).

The legislator may thus propose a set of intermediate commitments ΣINT for endorsement by the legislature as output commitments that the legislator believes the legislature is *entitled* to hold or *committed* to holding, in light of the subset of input commitments ΣINP the legislator holds and in light of the legislative commitments ΣLC the legislature already holds. In particular, ΣLC may include *INP, which is incompatible with the subset of input commitments ΣINP held by the legislator. So while the legislature does not hold *INP herself, the legislator may use the fact that *INP serves as an input commitment as a premise for her own proposals.

From the perspective of the legislature, the legislative process is about outputting laws that derive from all the popular commitments serving as input commitments and the legislative commitments the legislature has already endorsed. From the perspective of the legislature, the legislature *acknowledges* the legislative commitments it has already endorsed, but it does not necessarily *acknowledge* the popular commitments that serve as input commitments – it does, however, acknowledge that it has undertaken them. An informal way of putting this is that as far as the legislature is concerned, the commitments it has endorsed (by acknowledging them) are *true*, while it is agnostic about the truth values of the popular commitments it has not (yet) endorsed.

From the perspective of a given legislator, the legislative process is about proposing laws (and supporting other legislators' proposals) that derive from the popular commitments he or she *holds* and *the fact that* the legislature holds certain legislative commitments, which may or may not include commitments that are incompatible with the legislator's own commitments. From the perspective of the legislator, the legislator *acknowledges* the popular commitments he or she contributes as input commitments to the legislative process, but the legislator does not necessarily *acknowledge* the popular commitments other legislators contribute to the legislative process. An informal way of putting this is that as far as a given legislator is concerned, the commitments she has endorsed (by acknowledging them) are *true*, while the legislator is agnostic (or even antagonistic) about the truth values of the popular commitments she has not endorsed.

At all times, the difference between the perspective of the legislature and the perspective of the legislator must be kept in mind – in other words, it must

always be kept in mind *who* or *what* is holding a given commitment. Every legislator must therefore keep *two sets of books*: one set of books to keep track of which commitments she holds and which further commitments are permissively or committively implied by these commitments, as well as which further commitments are ruled out by these commitments; and a second set of books to keep track of which commitments *the legislature* holds and which further commitments are permissively or committively implied by these commitments, as well as which further commitments are ruled out by these commitments. A legislator may *acknowledge* or *endorse* a commitment *as her own* and use that commitment to justify further commitments of her own. But a legislator may also *attribute* a commitment to the legislature and use that commitment to justify further commitments that may be attributed to the legislature or that may be proposed for expression as a law – without necessarily endorsing those commitments herself.[242]

Brandom calls this process of keeping track of one's own commitments and entitlements and those of others "deontic scorekeeping:"[243]

> Mutual understanding and communication depend on interlocutors' being able to keep two sets of books, to move back and forth between the point of view of the speaker and the audience, while keeping straight on which […] commitments are undertaken and which are attributed by the various parties. Conceptual contents, paradigmatically propositional ones, can genuinely be shared, but their perspectival nature means that doing so is mastering the coordinated system of scorekeeping perspectives, not passing something nonperspectival from hand to hand (or mouth to mouth).[244]

The kind of "mutual understanding" and "communication" we are interested in here is the ability of legislators to negotiate legislation together even where they disagree on the truth[245] of the relevant commitments used as justifications. The "conceptual contents" of these commitments are thus always perspectival.

Canale and Tuzet summarize these relationships as follows:

> Competent practitioners keep track of their own and each other's linguistic actions: They "keep score" of commitments and entitlements by attributing these deontic statuses to others and undertaking them themselves.[246]

Substitute "legislative actions" for "linguistic actions," and this provides a good description of the legislative process: the legislative process thus takes place in the field of tension between the popular commitments held by legislators and the legislative commitments held by the legislature. Since the legislature can only act through its legislators, legislators must simultaneously keep track of their own commitments and of the legislature's

[242] At this point, we are only interested in cases where the second set of books refers to the commitments and entitlements of the *legislature*. But the same principle holds when the second set of books refers to the commitments and entitlements of *another legislator*, as will be discussed in subsection 6.2.2 below on "What it means for a commitment to mean the same thing."
[243] See Brandom 1994, 141-143.
[244] Brandom 1994, 590.
[245] Or even the *meaning*, as we shall see below in chapter 6 on "Recursive pluralism."
[246] Canale and Tuzet 2007, 36-37.

commitments. Proposals for legislative commitments always come from legislators, even if those legislators do not always hold the justifying commitments themselves.

The distinction between the perspective of the legislature and the perspective of the legislator also gives us an alternate way to describe *adequacy*: a law is adequate to a set of popular commitments if it can be justified in terms of that set *from the perspective of the legislature*. But given that a legislature can only engage in the process of justification through its individual legislators, a law can only be justified from the perspective of the legislature if it can be justified by *each individual legislator*. The operative word here is "can:" a legislator *can* justify a law if the law reflects the intermediate commitments which reflect the popular commitments serving as input commitments – whether that particular legislator holds all of those popular commitments or not. Whether a given legislator actually *does* justify a given law in practice is a separate question.

With these tools in hand, the next section will illustrate how to derive laws from *descriptive* input commitments in general; the section after next will illustrate how to derive laws from *conflicting* descriptive input commitments in particular.

5.3 Deriving output commitments from descriptive input commitments

5.3.1 Synthesizing prescriptive commitments

What the translation from prescriptive commitments into descriptive commitments has put asunder, the legislative process must join together again. Descriptive input commitments serve no purpose in the legislative process if they cannot serve as justifications for legislative proposals and therefore laws. Some descriptive input commitments are and always have been descriptive, while others started out as inadmissible prescriptive popular commitments that were decomposed into descriptive commitments (which may serve as input) and linking commitments (which in general may not, unless they are uncontroversial). It is this latter case which is of particular interest for the remainder of this chapter: the case where a descriptive input commitment has been translated from an inadmissible prescriptive popular commitment.

In order for descriptive input commitments, regardless of their origin, to serve as justifications for output commitments – i.e., in order for output commitments to *reflect* them rather than just coincidentally be *compatible* with them – they must in general be joined together again with *prescriptive* commitments of some sort. In particular, inadmissible prescriptive commitments that have been *decomposed* into admissible descriptive commitments and linking commitments must now be *synthesized* into prescriptive commitments as part of the legislative process.

Why is this the case? Due to the gap between descriptive commitments and prescriptive commitments, with is analogous to the gap between is-statements and ought-statements, descriptive commitments in isolation cannot straightforwardly serve as justifications for prescriptive commitments – such as those expressed by laws. This is the essence of the is-ought problem: ought-statements cannot be derived straightforwardly from is-statements.[247] A further prescriptive commitment is generally needed to link the descriptive (input) commitment to the prescriptive (output) commitment, i.e., to allow the descriptive (input) commitment to serve as a *justification* for the prescriptive (output) commitment. From section 5.1 on "Decomposing prescriptive commitments," we already know what is needed to make this link from a mere (descriptive) statement of fact to a (prescriptive) obligation: a *linking commitment* that lends its prescriptive force to the descriptive commitment.

When justifying prescriptive (output) commitments in terms of descriptive (input) commitments, the linking commitment is not always apparent and, in informal speech, is often omitted. Recall, for instance, our allergy sufferers in subsection 4.6.3: subset TCM of the population holds the descriptive commitment $DESC^{TCM}$ "acupuncture is an effective remedy against allergies." We claimed that TCM may argue:

"*Because* acupuncture is an effective remedy against allergies, allergy sufferers may use acupuncture at their own expense,"

thus justifying the law expressing the output commitment OUT "allergy sufferers may use acupuncture at their own expense" in terms of $DESC^{TCM}$ alone. However, an additional premise or link is missing here: namely the linking commitment LINK "allergy sufferers ought to be allowed to use effective remedies at their own expense."[248] The full justification should therefore read:

"*Because* acupuncture is an effective remedy against allergies ($DESC^{TCM}$), and *because* allergy sufferers ought to be allowed to use effective remedies at their own expense (LINK), allergy sufferers may use acupuncture at their own expense (OUT)."

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[247] As discussed on p. 98 and in n. 235 above, some thinkers on the is-ought problem dispute this, claiming that certain is-statements directly entail ought-statements – most prominently, teleologists and moral realists. See, e.g., MacIntyre 2007 and Harris 2010. But the claim of moral realists, for example, entails that is-statements of the relevant sort are *also* ought-statements: the prescriptive aspect of an is-statement can be read off of the statement directly. The distinction between descriptive commitments and prescriptive commitments thus collapses with respect to descriptive commitments that can serve directly as justifications for prescriptive commitments. The claim in this paper is that descriptive commitments that do *not* have a prescriptive aspect cannot serve directly as justifications for prescriptive commitments that *do* have a prescriptive aspect – a claim that even moral realists would agree to. Black 1964 offers a more general way of deriving prescriptive statements from generally *two* descriptive statements, but it is unclear how Black's method would transfer to statements that express *fundamental* (and subsidiary) commitments, as opposed to statements expressing contingent characteristics such as especially desires. Similarly, the attempt by Searle 1964, Searle 1969 and Searle 1995 to bridge the gap using speech acts and institutional facts does not straightforwardly transfer to fundamental commitments. Regardless of one's approach to blunting Hume's guillotine, this section and the following section should be understood as showing how prescriptive output commitments can be derived from descriptive input commitments even where other bridges from *is* to *ought* are unavailable or problematic.

[248] As we will see in subsection 5.4.3 below, this is not the only possible linking commitment.

This gives us a general pattern for the justification of a legislative output commitment (OUT):[249]

DESC & LINK ➢ OUT [250]

which means that a legislative output commitment is justified in terms of a descriptive commitment in conjunction with a linking commitment. The linking commitment LINK adds prescriptive force to the merely descriptive commitment.

This pattern also applies to legislative *proposals* advanced by individual legislators or groups thereof; i.e., *intermediate commitments* proposed as potential output commitments are derived in the same way:

DESC & LINK ➢ INT.

Where DESC comes from is clear: it is either a descriptive input commitment that has always been descriptive, or it is a descriptive input commitment that has been translated from a prescriptive popular commitment (where the linking commitment, i.e., the prescriptive force, has been "stripped off" for the purposes of legislative negotiations under law as pluralism). In either case, DESC is admissible as an input commitment because it is descriptive.

But where does LINK come from? In other words, what prescriptive commitments may serve as linking commitments within the legislative process? Clearly, *controversial* prescriptive commitments held by members of the population are ruled out under the justificatory constraint of law as pluralism – in particular, any linking commitments that have been "stripped off" during decomposition because they were controversial cannot reenter the legislative process. The solution is straightforward: only linking commitments that are uncontroversial, i.e., that are *held by the entire population*,[251] can serve as linking commitments within the legislative process. By conjoining a descriptive input commitment (which may have been decomposed from an inadmissible prescriptive popular commitment) with an uncontroversial linking commitment, a prescriptive commitment can be *synthesized* for the purpose of serving as an intermediate commitment (representing a legislative proposal) or an output commitment (representing a commitment actually endorsed by the legislature in order to express it as a law).

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[249] The following discussion elides the distinction between the modal verb "ought (not)," which is appropriate for popular commitments, and the modal verbs "shall/may (not)," which are appropriate for legislative (output) commitments.

[250] A stronger version of this inference would be *committive* as opposed to *permissive*, i.e., DESC & LINK → OUT. In general, however, inferences of this sort in legislative practice will be (merely) permissive – especially in light of the binding nature of output commitments as opposed to the generally non-binding nature of prescriptive input commitments such as LINK. A claim that X *ought to* do A may *entitle* one to claim that X *shall* do A, but it does not commit one to that claim. Committive inferences of this sort are more likely to arise when (binding) output commitments from previous legislative processes serve as linking commitments in a new legislative process.

[251] As always, in the relevant legislative jurisdiction. The *commitment to pluralism* is a special case of a potential linking commitment, since, by fiat, it is incorporated into the very structure of the legislative process.

In the general case, this synthesized prescriptive commitment will not be identical to any prescriptive commitment that was inadmissible because it was controversial. Synthesized prescriptive commitments are the best prescriptive commitments a legislator can work with during legislative negotiations, given that the justificatory constraint of law as pluralism has screened out her prescriptive commitments that were controversial. Which prescriptive commitments the legislator is able to synthesize during legislative negotiations depends on the particular constellation of popular commitments (in particular, on which prescriptive popular commitments are uncontroversial and hence admissible), and on the legislator's skill in decomposing controversial and hence inadmissible prescriptive commitments. If the legislator is skillful and if the constellation of popular commitments works to her advantage, she may be able to synthesize a prescriptive commitment within the legislative process that closely resembles the prescriptive popular commitment that was deemed inadmissible.

Where the legislator actually succeeds in synthesizing a prescriptive commitment that is *identical* to a prescriptive popular commitment that was screened out by the justificatory constraint of law as pluralism, then the legislator has successfully "smuggled in" that controversial popular commitment – but as an *intermediate commitment* justified in terms of admissible input commitments, not as an input commitment itself.

The following example illustrates this.

5.3.2 Smuggling in controversial prescriptive commitments

Say that one subset of the population, PL,[252] holds the prescriptive fundamental commitment $PRSC^{PL}$ "all abortions ought to be prohibited," and that the complementary subset of the population, PC,[253] holds the prescriptive fundamental commitment $PRSC^{PC}$ "only abortions after viability ought to be prohibited," where viability is determined by the best of medical ability, currently sometime in the second trimester. Note that

$PRSC^{PL}$ / $PRSC^{PC}$

i.e., the two prescriptive commitments are mutually incompatible and hence inadmissible as input commitments.

Now say that PL and PC decompose these inadmissible prescriptive commitments as follows: PL decomposes $PRSC^{PL}$ into $DESC^{PL}$ "human life begins at conception" and the linking commitment $LINK^{PL}$ "human life ought not to be aborted"; PC decomposes $PRSC^{PC}$ into $DESC^{PC}$ "human life begins at viability" and the linking commitment $LINK^{PC}$ "human life ought not to be aborted." Symbolically,

[252] As in "pro life."
[253] As in "pro choice."

$PRSC^{PL} \succ DESC^{PL}$ & $LINK^{PL}$

$PRSC^{PC} \succ DESC^{PC}$ & $LINK^{PC}$.

Note that

$DESC^{PL}$ / $DESC^{PC}$

i.e., the two descriptive commitments are mutually incompatible, but because they are descriptive, they are admissible as input commitments.

Note also that both PL and PC hold the linking commitment $LINK^{PL}$ = $LINK^{PC}$ = LINK "human life ought not to be aborted." LINK is thus uncontroversial. Since it is uncontroversial, this prescriptive commitment may serve as an input commitment and thus as a justification of a legislative output commitment or of any proposals for such an output commitment. PL may therefore argue:

"*Because* human life begins at conception ($DESC^{PL}$), and *because* human life ought not to be aborted (LINK), all abortions ought to be prohibited (INT^{PL})." In symbolic notation:

$DESC^{PL}$ & LINK $\succ$ INT^{PL} .

PC, conversely, may argue:

"*Because* human life begins at viability ($DESC^{PC}$), and *because* human life ought not to be aborted (LINK), only abortions after viability ought to be prohibited (INT^{PC})." I.e.,

$DESC^{PC}$ & LINK $\succ$ INT^{PC} .

PL thus is entitled to offer the prescriptive intermediate commitment INT^{PL} "all abortions ought to be prohibited" as a proposal for an output commitment, while PC is entitled to offer the prescriptive intermediate commitment INT^{PC} "only abortions after viability ought to be prohibited" as a proposal for an output commitment.

Note what has happened here: because of the way PL has broken down the initial prescriptive commitment $PRSC^{PL}$ "all abortions ought to be prohibited" (which, under the justificatory constraint of law as pluralism, may not serve as an input commitment to the legislative process, since it is prescriptive and controversial) into a descriptive commitment $DESC^{PL}$ "human life begins at conception" (which may serve as an input commitment, since it is descriptive) and a linking commitment LINK "human life ought not to be aborted" (which may also serve as an input commitment, since it is uncontroversial), PL is *entitled* to offer INT^{PL} = $PRSC^{PL}$ as a proposal *within* the legislative process, even though $PRSC^{PL}$ cannot serve as an *input* commitment. Accordingly, the *legislature* may also hold INT^{PL} = $PRSC^{PL}$ as a intermediate commitment, even though it may not hold it as an input commitment. While $PRSC^{PL}$ cannot enter the legislative process directly as an *unjustified* commitment, it can nevertheless serve as a justification within the legislative process because it

has itself been *justified* in terms of descriptive commitments and linking commitments that are admissible as input commitments. $PRSC^{PL}$ as a *fundamental* (or more generally, popular) commitment is thus excluded from the legislative process; but $PRSC^{PL}$ as an *intermediate* (legislative) commitment is admissible. The proposal cannot be justified in terms of $PRSC^{PL}$ as a controversial input commitment; but it may be justified in terms of $PRSC^{PL}$ if $PRSC^{PL}$ is in turn justified in terms of a descriptive input commitment and an uncontroversial linking commitment.

This is analogously true of $PRSC^{PC}$, which may likewise not serve as an input commitment, but it may be derived from $DESC^{PC}$ and LINK, which both may serve as input commitments. As an *intermediate, legislative* commitment, INT^{PC} = $PRSC^{PC}$ "only abortions after viability ought to be prohibited" may serve as a proposal for an output commitment.

The two controversial prescriptive popular commitments $PRSC^{PL}$ and $PRSC^{PC}$ have thus been "smuggled into" the legislative process by way of decomposition and synthesis: they have been decomposed into commitments that are admissible as input commitments to the legislative process, and they have been synthesized out of these admissible commitments *within the legislative process*.

Note, however, that while the legislature may *hold* these controversial prescriptive commitments as intermediate commitments, it does not necessarily *endorse* them – unless it adopts a law that expresses them.[254] Hence,

H (L, $PRSC^{PL}$) & H (L, $PRSC^{PC}$), but ~E (L, $PRSC^{PL}$) & ~E (L, $PRSC^{PC}$).

We have thus shown how both legislative proposals INT^{PL} = $PRSC^{PL}$ "all abortions ought to be prohibited" and INT^{PC} = $PRSC^{PC}$ "only abortions after viability ought to be prohibited" can be justified in terms of admissible input commitments. There is, of course, no law which expresses *both* equivalent output commitments OUT^{PL} "all abortions shall be prohibited" and OUT^{PC} "only abortions after viability shall be prohibited" in a consistent manner. The process of decomposing inadmissible prescriptive commitments into admissible descriptive commitments and admissible linking commitments, thus enabling legislators to "smuggle in" inadmissible prescriptive commitments, does not result in a unique specification of a consistent law. The process of decomposition and synthesis merely clarifies which commitments may serve as justifications for laws and how those justifications may be derived.[255]

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[254] Or otherwise endorses them by making them explicit, as we shall see in section 7.1 below.

[255] This process of decomposition and synthesis mirrors or implements the two logical moments of comprehensive pluralism according to Rosenfeld 1999, 209: "Set against a competition among a multiplicity of first-order norms vying for predominance, comprehensive pluralism's first logical moment is a negative one characterized by a strict refusal to endorse or favor any of the competing first-order norms. Thus, in its negative moment, comprehensive pluralism imposes strict equality and neutrality among all existing first-order norms and the conceptions of the good from which they derive." This first, negative moment corresponds to the decomposition of prescriptive popular commitments necessitated by the justificatory constraint of law as pluralism, which implements the prima facie equal treatment of fundamental commitments under the normative conception of

5.3.3 Skillful decomposition of prescriptive commitments

This will serve us well in the chapter 6 on "Recursive pluralism," which will illustrate how to derive laws that *do* reflect all the (descriptive and uncontroversial prescriptive) input commitments in a consistent manner. But it also helps us answer the question that motivated this example: How can a legislator *skillfully* smuggle a prescriptive commitment into the legislative process by decomposing it first into a descriptive commitment and a linking commitment? Are there good ways and bad ways to go about doing this?

The legislators representing subsets of the population PL and PC in the example above were successful in smuggling in their prescriptive commitments $PRSC^{PL}$ and $PRSC^{PC}$: by decomposing them completely into descriptive commitments and linking commitments that can serve as input to the legislative process, the legislators ensured that $PRSC^{PL}$ and $PRSC^{PC}$ can serve as justifications for laws, even though they are introduced into legislative negotiations as intermediate commitments derived from input commitments rather than directly as popular commitments serving as input commitments.

But what if $PRSC^{PL}$, for instance, had been decomposed differently? Recall that $PRSC^{PL}$ is "all abortions ought to be prohibited." Say that the legislator representing PL had opted to decompose $PRSC^{PL}$ into $DESC^{PL}_2$ "abortion is against the will of God" and $LINK^{PL}_2$ "the will of God ought to be law." Also

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pluralism. Rosenfeld continues: "Carried to its logical conclusion, however, comprehensive pluralism's first moment leads to self-destruction. If all first-order norms are completely neutralized through a leveling negation, then the very pursuit of pluralism would become meaningless. In the absence of a plurality of viable conceptions of the good, no first-order norms would remain for pluralism to protect. Accordingly, to avoid self-destruction, comprehensive pluralism must supplement its negative moment with a positive moment. The object of that positive moment is to foster readmittance of previously leveled and equalized conceptions of the good into the pluralist universe." This second, positive moment corresponds to the synthesis of prescriptive intermediate commitments within the legislative process, thus "readmitting" prescriptive popular commitments that were previously screened out by the justificatory constraint. But as Rosenfeld points out: "Not all conceptions of the good excluded in the course of comprehensive pluralism's negative moment can gain readmission in its positive moment. For example, a crusading religion, for which conversion of the infidel, by force if necessary, is a sacred duty that admits of no exceptions, has no place under comprehensive pluralism." It has no place under law as pluralism, either: a prescriptive commitment can only be "readmitted" or synthesized by way of a linking commitment that is *uncontroversial*: this ensures that the *content* of competing commitments is taken into account when readmitting or synthesizing controversial prescriptive commitments. While law as pluralism is defined as a procedure, without adherence to any substantive norms other than the second-order commitment to pluralism, its reliance on the content of conflicting commitments during the synthesis phase keeps law of pluralism from degenerating into pure *proceduralism*. Rosenfeld 1999, 211, makes the analogous claim about comprehensive pluralism: "[S]ince regeneration of first-order norms in the course of its positive moment is not automatic, but instead contingent on their compatibility with second-order norms and with other first-order norms, comprehensive pluralism's positive moment, unlike its negative moment, is not reducible to proceduralism." What distinguishes law as pluralism from comprehensive pluralism in this context is that decomposition, unlike the first moment of comprehensive pluralism, is not entirely reducible to proceduralism, either, since the *content* of prescriptive popular commitments determines whether they are uncontroversial and hence admissible as input commitments in the first place.

assume that the legislator representing PC had opted to decompose $PRSC^{PC}$ "only abortions after viability ought to be prohibited" as before into $DESC^{PC}$ "human life begins at viability" and $LINK^{PC}$ "human life ought not to be aborted." What would the consequences of this different strategy be for the proposed output commitments OUT^{PL} "all abortions shall be prohibited" and OUT^{PC} "only abortions after viability shall be prohibited"?

As before, OUT^{PC} can still be justified within the legislative process solely in terms of admissible input commitments: it derives from $DESC^{PC}$, which is admissible because it is descriptive, and from $LINK^{PC}$, which is admissible because it is shared by PL and hence uncontroversial.[256] OUT^{PL}, however, can now no longer be justified solely in terms of admissible input commitments: while $DESC^{PL}_2$, as a descriptive commitment, is admissible, $LINK^{PL}_2$ is not, since the "the will of God ought to be law" is not shared by PC,[257] and hence it cannot serve as a linking commitment. Because of the way the legislators representing PL and PC, respectively, opted to decompose their prescriptive commitments, the output commitment OUT^{PC} reflecting PC's fundamental commitments can be justified within the legislative process, while the output commitment OUT^{PL} reflecting PL's fundamental commitments cannot. Because the legislator representing PC was more skillful than the legislator representing PL, PC's prescriptive commitments could be smuggled into the legislative process and reflected in the output commitment, while PL's prescriptive commitments could not.

Of course, not all is lost for PL: the PL legislator must merely decompose $PRSC^{PL}$ according to the first method, namely into $DESC^{PL}$ and $LINK^{PL}$ instead of according to the second method, namely into $DESC^{PL}_2$ and $LINK^{PL}_2$. Then the legislative playing field would be level again.

At first glance, it might appear as if law as pluralism indeed privileges non-religious justifications over religious justifications, thus deriving a kind of "principle of secular rationale"[258] through the back door: after all, $LINK^{PL}$ "human life ought not to be aborted" is admissible as an input commitment, while $LINK^{PL}_2$ "the will of God ought to be law" is not. But this conclusion is false for three reasons: First, *descriptive* religious commitments such as "abortion is against the will of God" are just as admissible as are descriptive non-religious commitments such as "human life begins at viability." Second, an admissible prescriptive popular commitment such as "human life ought not to be aborted" may in fact (also) be motivated by religious conviction. Third, what separates admissible from inadmissible prescriptive popular commitments is not their religious or non-religious motivation, but rather their *shared* nature. Non-religious prescriptive commitments that are not shared are just as inadmissible as are religious prescriptive commitments that are not shared.[259]

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[256] Even though PL has not explicitly endorsed $LINK^{PC}$ by introducing it as a commitment of its own, $LINK^{PC}$ "human life ought not to be aborted" is a committive inference of $PRSC^{PL}$ "all abortions ought to be prohibited," which we know PL holds.

[257] At least as far as we know: if *everyone* agrees that the will of God ought to be law, then OUT^{PL} can in fact be justified solely in terms of admissible input commitments.

[258] Cf. Audi 2000, 86.

[259] But always bear in mind that not *all* input commitments used as justifications in the legislative process must be shared (or "public"): only *prescriptive* input commitments must be shared, not *descriptive* input commitments.

This last point can be illustrated by flipping the previous example. Say that, as in the original example, PL decomposes its prescriptive commitment $PRSC^{PL}$ "all abortions ought to be prohibited" into $DESC^{PL}$ "human life begins at conception" and $LINK^{PL}$ "human life ought not to be aborted." PC, however, deviates from the original example and decomposes its prescriptive commitment $PRSC^{PC}$ "only abortions after viability ought to be prohibited" into $DESC^{PC}_{2}$ "before viability, embryos and fetuses are part of the pregnant woman's body and have no independent existence" and $LINK^{PC}_{2}$ "women ought to have full control over their own bodies." In this case, $PRSC^{PL}$ can be justified as an intermediate commitment within the legislative process in terms of admissible input commitments, and it may serve as a justification for the output commitment OUT^{PL} "all abortions shall be prohibited," while $PRSC^{PC}$ relies on the linking commitment $LINK^{PC}_{2}$, which is inadmissible because it is not shared by PL,[260] and hence $PRSC^{PC}$ cannot serve as a justification for the output commitment OUT^{PC} "only abortions after viability shall be prohibited." Here, PL is represented by the more skillful legislator, and the output commitment reflects its prescriptive commitments, while PC is left out in the cold, because its desired output commitment cannot be justified in terms of its prescriptive commitments (in the way they have been decomposed by PC's legislator). Even though PC's linking commitment $LINK^{PC}_{2}$ "women ought to have full control over their own bodies" is entirely non-religious (or at least PC believes it to be), it is not admissible as an input commitment because it is not shared.

The moral of the story is: legislators are free to decompose their prescriptive commitments into whatever descriptive commitments and linking commitments they please – depending, for instance, on what other commitments they hold and why they hold the commitments they hold; but a *skillful* legislator whose goal is to smuggle her prescriptive (popular) commitments into the legislative process will *always* decompose her prescriptive commitments as follows:

PRSC ➢ DESC & LINK, *where LINK is an uncontroversial prescriptive commitment.*

If this decomposition rule is followed, the legislator may make legislative proposals that reflect her prescriptive (popular) commitments, even if those prescriptive commitments are controversial and hence inadmissible as input commitments. If this decomposition rule is not followed, there is a danger that the legislator will be unable to justify her preferred legislative proposals in terms of admissible input commitments and hence these proposals are ruled out by the justificatory constraint of law as pluralism, while competing legislative proposals that *are* so justified determine which laws are outputted by the legislative process.

[260] At least as far as we know: if *everyone* agrees that women ought to have full control over their own bodies, then OUT^{PC} can in fact be justified solely in terms of admissible input commitments.

For instance, the prescriptive popular commitment "methane emissions ought to be reduced"[261] might skillfully be decomposed into the descriptive commitment "methane emissions cause global warming" and the linking commitment "global warming ought to be reduced" if everyone in fact agrees that global warming ought to be reduced (even if they do not necessarily agree that methane emissions cause global warming). The output commitment "methane emissions shall be reduced" would thus be justifiable in terms of the skillfully decomposed prescriptive popular commitment. But if there is disagreement as to whether global warming ought to be reduced (say, if some legislators believe that northern climes ought to be given a chance to grow more wheat and corn), then another decomposition of "methane emissions ought to be reduced" might be more appropriate: say, into the (compound) descriptive commitment "methane emissions cause the ozone layer to deteriorate, which causes skin cancer" and the linking commitment "skin cancer ought to be reduced" – if everyone in fact agrees that skin cancer ought to be reduced.[262]

The legislator's skill thus lies in the ability to gauge which linking commitments are shared by everyone (or at least are represented by all legislators) and hence can serve as admissible linking commitments in the legislative process. This determination of a skillful decomposition is *contingent* on the actual makeup of the legislature and the population the legislature represents: there is no way to simply "read off" from a prescriptive commitment PRSC what would be a "good" way to decompose it into a descriptive commitment DESC and a linking commitment LINK. A decomposition is only "good" if the commitment expressed by the split-off prescriptive component LINK is in fact shared by everyone.

5.4 Deriving output commitments from conflicting descriptive input commitments

5.4.1 Getting to the same law by different routes

The example of methane emissions at the end of the last section suggests how laws – expressing legislative commitments that are actually *endorsed* by the legislature as output commitments, rather than merely *proposed* by individual legislators as intermediate commitments – can be justified in terms of different, distinct descriptive popular commitments serving as input commitments. For instance, the law "methane emissions shall be reduced" may be justified in terms of the descriptive commitment "methane emissions cause global warming" and the linking commitment "global warming ought to be reduced," assuming that everyone agrees on that linking commitment,

[261] This is probably not a *fundamental* popular commitment, but it may very well be a *subsidiary* commitment derived from fundamental commitments.

[262] Note that it matters not to law as pluralism whether the decomposition is "sincere" or "insincere," i.e., whether the legislator, deep down in her heart of hearts, truly believes that the descriptive commitment resulting from the decomposition is true. In this sense, law as pluralism has more affinity with the approach of Greenawalt 1995, 163-164, in relation to public justification than, say, to Rawls, at least as interpreted by Greenawalt 1995, 112-113, or to Sajó 2008, 626, specifically with regard to legislative reasons: "The legislative reasons given must be honest; their honesty and accessibility are subject to judicial review."

and that same law may be justified in terms of the descriptive commitment "methane emissions cause the ozone layer to deteriorate, which causes skin cancer" and the linking commitment "skin cancer ought to be reduced," assuming that everyone agrees on that linking commitment. The same output commitment may thus be justified in terms of distinct descriptive input commitments, *even if each of the descriptive input commitments is controversial*, i.e., even if not everyone agrees that "methane emissions cause global warming" and not everyone agrees that "methane emissions cause the ozone layer to deteriorate, which causes skin cancer." In fact, the law "methane emissions shall be reduced" may be endorsed by *everyone* (and hence by the legislature, which represents everyone), even if *no one* in the legislature believes that *both* of these descriptive input commitments are true. As long as everyone holds both of the two linking commitments ("global warming ought to be reduced" and "skin cancer ought to be reduced"), *no one* needs to simultaneously hold both of the descriptive popular commitments serving as input commitments. The same law can thus be justified by two different routes that originate at two different (controversial) starting points, pass through two different (uncontroversial) linking commitments, and end up at the same (uncontroversial) output commitment, which is then endorsed in the form of a law.

This is also true even if the descriptive input commitments *conflict* with each other, i.e., are mutually incompatible. In subsection 4.6.3 on "No exclusion of other input commitments" and section 5.2 on "Deriving output commitments from input commitments," we developed some of the tools for doing this. The following subsection uses an example to illustrate in more detail how this is done, with the help of uncontroversial, but distinct, linking commitments.

5.4.2 Derivation using distinct linking commitments

Let's go back and see how our allergy sufferers in subsection 4.6.3 are doing. Recall that one subset of the population, TCM, believes that $DESC^{TCM}$ "acupuncture is an effective remedy against allergies," while the complementary subset of the population, NTCM, believes that $*DESC^{TCM}$ "acupuncture is *not* an effective remedy against allergies." $DESC^{TCM}$ and $*DESC^{TCM}$ are mutually incompatible; the set of descriptive commitments $\{DESC^{TCM}, *DESC^{TCM}\}$ is inconsistent. In order for a law expressing an output commitment OUT to reflect *both* of these descriptive commitments under law as pluralism, there must be a linking commitment $LINK^{TCM}$ that is used by TCM as part of its justification of OUT *but is also held by NTCM*, even if NTCM does not use it as part of its justification; analogously, there must be a linking commitment $LINK^{NTCM}$ that is used by NTCM as part of its justification of OUT *but is also held by TCM*, even if TCM does not use it as part of its justification. Why does $LINK^{TCM}$ have to be *held* by NTCM, even if NTCM does not use it as part of its justification, and why does $LINK^{NTCM}$ have to be *held* by TCM, even if TCM does not use it as part of it justification? Because otherwise, these linking commitments would be controversial and hence ruled out by the justificatory constraint of law as pluralism.

In the TCM example in subsection 5.3.1 on "Synthesizing prescriptive commitments," a candidate for $LINK^{TCM}$ was suggested: "allergy sufferers

ought to be allowed to use effective remedies at their own expense." This linking commitment would allow TCM to argue:

"Because acupuncture is an effective remedy against allergies ($DESC^{TCM}$), and because allergy sufferers ought to be allowed to use effective remedies at their own expense ($LINK^{TCM}$), allergy sufferers may use acupuncture at their own expense (OUT)."

Is NTCM likely also to hold $LINK^{TCM}$? It would certainly not be inconsistent for NTCM to do so: the disagreement between TCM and NTCM is not about TCM's linking commitment, but rather about TCM's descriptive commitment. If NTCM does indeed hold $LINK^{TCM}$, TCM may use it as a linking commitment under the justificatory constraint of law as pluralism.

Even though NTCM may *hold* $LINK^{TCM}$, however, it does not use it as part of its own justification: there is no way to get from $*DESC^{TCM}$ "acupuncture is *not* an effective remedy against allergies" to OUT "allergy sufferers may use acupuncture at their own expense" by way of $LINK^{TCM}$ "allergy sufferers ought to be allowed to use *effective* remedies at their own expense." In order to get from $*DESC^{TCM}$ to OUT, NTCM may instead use the following linking commitment $LINK^{NTCM}$: "allergy sufferers ought to be allowed to use *ineffective* remedies at their own expense." This linking commitment would allow NTCM to argue:

"Because acupuncture is *not* an effective remedy against allergies ($*DESC^{TCM}$), and because allergy sufferers ought to be allowed to use *ineffective* remedies at their own expense ($LINK^{NTCM}$), allergy sufferers may use acupuncture at their own expense (OUT)."

Although TCM does not use NTCM's linking commitment $LINK^{NTCM}$ as part of its own justification, TCM may very well still *hold* $LINK^{NTCM}$. If this is the case, both $LINK^{TCM}$ and $LINK^{NTCM}$ are therefore admissible under the justificatory constraint of law as pluralism. The legislative output commitment OUT can accordingly be justified by way of two distinct pairs of descriptive commitments and linking commitments, even though the respective descriptive commitments are mutually incompatible:

$DESC^{TCM}$ & $LINK^{TCM}$ ➢ OUT and

$*DESC^{TCM}$ & $LINK^{NTCM}$ ➢ OUT,

where $\{DESC^{TCM}, *DESC^{TCM}\}$ is inconsistent but $\{LINK^{TCM}, LINK^{NTCM}\}$ is not.

5.4.3 Derivation using shared linking commitments

In the example in the preceding subsection, $LINK^{TCM}$ and $LINK^{NTCM}$ were uncontroversial, but they were not identical, i.e.

$LINK^{TCM} \neq LINK^{NTCM}$.

While these linking commitments were uncontroversial, they were not *used* by both TCM and NTCM as part of their respective justifications, and hence it had to be *surmised* that they were in fact uncontroversial.

Is it instead possible to find a single, shared linking commitment LINK that is in fact *used* by both TCM and NTCM as part of their respective justifications – analogously to the shared linking commitment in the abortion example in 5.3.2, but where a *consensual* output commitment can be justified in terms of the input commitments? I.e., can a consensual law be justified by conflicting descriptive input commitments and a single, shared, uncontroversial linking commitment? If so, then we have come a long way toward a mechanism for generating legislation that is adequate to conflicting (descriptive) popular commitments.

The easiest solution would be the conjunction of $LINK^{TCM}$ and $LINK^{NTCM}$: "allergy sufferers ought to be allowed to use *effective* remedies at their own expense ($LINK^{TCM}$), and allergy sufferers ought to be allowed to use *ineffective* remedies at their own expense ($LINK^{NTCM}$)." This can be simplified as $LINK_1$: "allergy sufferers ought to be allowed to use *any* remedy, *whether effective or ineffective*, at their own expense." This allows TCM to say:

"Because acupuncture is an effective remedy against allergies ($DESC^{TCM}$), and because allergy sufferers ought to be allowed to use any remedy, whether effective or ineffective, at their own expense ($LINK_1$), allergy sufferers may use acupuncture at their own expense (OUT)."

NTCM can make the analogous argument:

"Because acupuncture is not an effective remedy against allergies ($*DESC^{TCM}$), and because allergy sufferers ought to be allowed to use any remedy, whether effective or ineffective, at their own expense ($LINK_1$), allergy sufferers may use acupuncture at their own expense (OUT)."

As a *commitment*, $LINK_1$ is a weak one, however, and it leaves out a lot of information that might be relevant to both TCM and NTCM. It makes no distinction between remedies that both TCM and NTCM might deem effective (say, cortisone shots) and those that both TCM and NTCM might deem ineffective (say, tap-dancing). Both TCM and NTCM might hold a shared commitment that *effective* remedies ought to be paid for by health insurers, while *ineffective* remedies ought to be paid for by allergy sufferers out of their own pockets. In each of the descriptive commitments $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" and $*DESC^{TCM}$ "acupuncture is not an effective remedy against allergies," the only operative part of the predicate for purposes of the justification via $LINK_1$ is that acupuncture is (some sort of) a *remedy against allergies*, not that it is *effective* or *ineffective*. Both TCM's descriptive commitment and NTCM's descriptive commitment could be reformulated as "acupuncture is (some sort of) a remedy against allergies" and could be used by both as a premise in their argument. But then TCM and NTCM wouldn't *disagree* about their relevant descriptive commitments, and the set of descriptive input commitments would be trivially consistent. In effect, the linking commitment $LINK_1$ filters

out the controversial aspects of the descriptive commitments and makes them irrelevant to everyone's argument.

A stronger linking commitment would be one that both TCM and NTCM share, but that preserves the distinct, conflicting aspects of their respective descriptive commitments. The following linking commitment $LINK_2$ meets these criteria:

$LINK_2$: "allergy sufferers ought to be allowed to use remedies *whose effectiveness is contested* at least at their own expense."

What does it mean for something to be *contested*? It does not simply mean that two input commitments are incompatible – in this case, the input commitments $DESC^{TCM}$ and $*DESC^{TCM}$. It means that the incompatibility at issue arises due to an *essentially contested concept* – in this case, the concept "effective remedy against allergies."[263] TCM and NTCM do not agree on the *meaning* of "effective remedy against allergies:"[264] TCM believes that "effective remedy against allergies" means a set of remedies that includes acupuncture; NTCM believes that "effective remedy against allergies" means a set of remedies that does not include acupuncture. The incompatibility between $DESC^{TCM}$ and $*DESC^{TCM}$ thus arises due to the essential contestability of the concept they both make use of, namely "effective remedy against allergies." Specifically, it is the *effectiveness* of remedies against allergies that is contested (not, say, what constitutes a remedy or an allergy).

Under the assumptions we've made here, both TCM and NTCM are likely to share this prescriptive commitment, hence it is admissible as an input commitment under the justificatory constraint of law as pluralism.[265] Assuming that all legislators hold $LINK_2$ and hence $LINK_2$ is uncontroversial, the legislature can even *endorse* $LINK_2$ (as an intermediate commitment) without contradiction. Therefore, for a legislature L,

$(\forall X\ H\ (X, LINK_2)) \succ (E\ (L, LINK_2))$.

But does $LINK_2$ actually allow TCM to make the following argument:

"Because acupuncture is an effective remedy against allergies ($DESC^{TCM}$), and because allergy sufferers ought to be allowed to use remedies whose effectiveness is contested at least at their own expense ($LINK_2$), allergy sufferers may use acupuncture at their own expense (OUT),"

[263] This is analogous to the essential contestability of "a work of art." See the discussion on essentially contested concepts on p. 62 and in n. 152.
[264] At least in terms of its *extension*, i.e., the set of referents to which it applies, as opposed to its *intension*, i.e., the set of features shared by everything to which it applies. Subsection 6.2.2 below will discuss in detail the differences of meaning that are relevant to law as pluralism.
[265] But note that this is an entirely contingent fact: another legislature might include members who do not share this commitment, in which case it would be inadmissible as an input commitment. Unlike the distinct linking commitments in the previous subsection, however, the uncontroversial nature of this linking commitment can be put to the test – namely, by seeing whether both TCM and NTCM *use* it as part of their justifications.

while NTCM may make the analogous argument using *$DESC^{TCM}$ instead of $DESC^{TCM}$? Yes – but an additional premise is missing, namely the descriptive commitment

$DESC_{ECC}$: "the effectiveness of acupuncture as a remedy against allergies is contested."

Where does $DESC_{ECC}$ come from, and who holds it? It is not an input commitment in the scenario described here: the only popular commitments serving as descriptive input commitments that say anything about the effectiveness of acupuncture are $DESC^{TCM}$ and *$DESC^{TCM}$, which claim that acupuncture is effective and ineffective, respectively. As far as TCM and NTCM know at the outset, the concept "effective remedy against allergies" may *not* be essentially contested; it only turns out to be essentially contested once the legislative process is underway.

$DESC_{ECC}$ is instead a descriptive commitment that emerges *through the legislative process* and is held *by the legislature*. $DESC_{ECC}$ is thus a (descriptive) *intermediate legislative commitment*. It does not say anything about the effectiveness of acupuncture as such; instead, it says something about what the input commitments say about the effectiveness of acupuncture. In this sense, $DESC_{ECC}$ is a descriptive commitment *about* the subsets of the population (and the legislators representing these subsets) and the input commitments they hold, not *about* the object of those input commitments. The formulation of $DESC_{ECC}$ depends entirely on the contingent fact of which popular commitments enter the legislative process as input commitments, and because that fact is uncontroversial, $DESC_{ECC}$ is itself uncontroversial; it can thus be *endorsed* by the legislature. This derivation can be represented as follows, where L is the legislature:

H (TCM, $DESC^{TCM}$) & H (NTCM, *$DESC^{TCM}$)

- H (L, {$DESC^{TCM}$, *$DESC^{TCM}$ })
- H (L, $DESC_{ECC}$)
- E (L, $DESC_{ECC}$).

The intermediate commitment $DESC_{ECC}$ is thus a recognition *by the legislature* (and hence by the legislators making up the legislature) that the inconsistency of a set of input commitments arises from the essential contestability of a concept employed by those commitments. Since TCM holds $DESC^{TCM}$ and NTCM holds the conflicting commitment *$DESC^{TCM}$, and since both of these descriptive popular commitments may serve as input commitments, the legislature is entitled to hold them. But it cannot *endorse* them, since they are mutually incompatible: it can only endorse the fact that their mutual incompatibility arises from the essential contestability of the key concept they employ.

From the perspective of a particular legislator, each of the descriptive commitments $DESC^{TCM}$ and *$DESC^{TCM}$ is held by *some* legislators within the

legislative process, but not necessarily by that particular legislator. From the perspective of a legislator representing NTCM, for instance,

$\exists$ Y (H (Y, $DESC^{TCM}$))

is true even if $DESC^{TCM}$ is not. Since the legislature *holds* any popular commitment that serves as an input commitment, the legislator representing NTCM will also be able to use H (L, $DESC^{TCM}$) as a premise for her arguments, even if the legislator does not hold $DESC^{TCM}$ herself. Accordingly, all legislators in the legislature can derive the legislative proposal expressing the output commitment OUT "allergy sufferers may use acupuncture at their own expense" as follows:

H (L, $DESC^{TCM}$) & H (L, *$DESC^{TCM}$) $\succ$ E (L, $DESC_{ECC}$)

E (L, $DESC_{ECC}$) & E (L, $LINK_2$) $\succ$ E (L, OUT).

Or in words: "Because the legislature has endorsed that the effectiveness of acupuncture as a remedy against allergies is contested (E (L, $DESC_{ECC}$)), and because the legislature has endorsed that allergy sufferers ought to be allowed to use remedies whose effectiveness is contested at least at their own expense (E (L, $LINK_2$)), the legislature may endorse that allergy sufferers may use acupuncture at their own expense (E (L, OUT))."

The justification for the legislature to adopt the law expressing OUT is thus derived from the two conflicting descriptive input commitments $DESC^{TCM}$ and *$DESC^{TCM}$, the descriptive intermediate commitment $DESC_{ECC}$ inferred from this inconsistent set of input commitments, and the shared linking commitment $LINK_2$, all of which are either admissible as input commitments under the justificatory constraint of law as pluralism, or are derived as uncontroversial legislative commitments within the legislative process. Given two conflicting descriptive input commitments and a shared prescriptive input commitment, the legislative process outputs a law that reflects all of these input commitments. The law is thus *adequate* to the conflicting descriptive popular commitments serving as input to the legislative process.

Of course, this is only possible in our TCM scenario because a (reasonably) strong linking commitment $LINK_2$ was found that can help justify a (reasonably) strong law. In the worst case scenario, the only available linking commitments will be the (potentially very weak) lowest common denominator of the legislators' prescriptive commitments. Chapter 6 on "Recursive pluralism" below will discuss how to derive laws nevertheless when no strong linking commitments can be found.

But first, consider a variant on this subsection's TCM example: namely where the mutually incompatible popular commitments are originally *prescriptive*, not *descriptive.*

5.4.4 Derivation from decomposed prescriptive commitments

The preceding TCM example started with conflicting descriptive commitments that (as far as we know) were not translated from prescriptive commitments. Now consider the situation where a law is justified in terms of conflicting descriptive commitments which are in fact translated from conflicting prescriptive commitments. Is it still possible for legislators holding conflicting prescriptive commitments to justify the same law, i.e., can a law be found that is adequate to an inconsistent set of *prescriptive* popular commitments (to the extent achievable under the justificatory constraint)?

Let's start with the prescriptive popular commitments held by TCM and NTCM, respectively, in subsection 4.6.3:

$PRSC^{TCM}$: "health insurers ought to pay for acupuncture treatment of allergies," and

$*PRSC^{TCM}$: "health insurers ought *not* to pay for acupuncture treatment of allergies."

These prescriptive commitments are mutually incompatible; the set {$PRSC^{TCM}$, $*PRSC^{TCM}$} is inconsistent. As noted in subsection 4.6.3, there is *no* (relevant) law expressing a legislative output commitment OUT that (fully) reflects both prescriptive commitments $PRSC^{TCM}$ and $*PRSC^{TCM}$. But is there a law that reflects these commitments to the extent achievable under the justificatory constraint of law as pluralism?

$PRSC^{TCM}$ can be straightforwardly decomposed into $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" and $LINK^{TCM}$ "health insurers ought to pay for effective remedies against allergies." Analogously, $*PRSC^{TCM}$ can be decomposed into $*DESC^{TCM}$ "acupuncture is not an effective remedy against allergies" and $LINK^{NTCM}$ "health insurers ought not to pay for ineffective remedies against allergies." $DESC^{TCM}$ and $*DESC^{TCM}$ can serve as input commitments because they are descriptive; $LINK^{TCM}$ and $LINK^{NTCM}$ can serve as input commitments because they are uncontroversial.[266] As before:

$H (L, DESC^{TCM}) \& H (L, *DESC^{TCM}) \succ E (L, DESC_{ECC})$,

i.e., the legislature endorses that the effectiveness of acupuncture as a remedy against allergies is contested.

Is $LINK_2$ still available as a linking commitment as it was before in order to derive

$E (L, DESC_{ECC}) \& E (L, LINK_2) \succ E (L, OUT)$?

In other words, can both TCM and NTCM hold the commitment

[266] At least we have no reason to believe that TCM or NTCM would object to either of them. But note that even if these linking commitments are uncontroversial, the term "(in)effective remedy" is still an essentially contested concept – TCM and NTCM do not agree on what that term *means* (at least in terms of its *extension* as opposed to its *intension*). See the discussion in subsection 5.4.3 above.

$LINK_2$: "allergy sufferers ought to be allowed to use remedies whose effectiveness is contested at least at their own expense"?

As always, the answer in practice depends on the makeup of the particular legislature in question and the population it represents. But there is no theoretical obstacle to both TCM and NTCM holding $LINK_2$, given that $LINK_2$ is not incompatible with any of the known prescriptive commitments held by TCM and NTCM, including $PRSC^{TCM}$ and $*PRSC^{TCM}$, respectively: $LINK_2$ does not conflict with $PRSC^{TCM}$ because a commitment that health insurers ought to pay for acupuncture does not rule out that allergy sufferers ought to be allowed to use acupuncture *at least* at their own expense, while $LINK_2$ does not conflict with $*PRSC^{TCM}$ because a commitment that health insurers ought not to pay for acupuncture does not rule out that allergy sufferers ought to be allowed to use acupuncture at least *at their own expense*. $LINK_2$ is likely compatible with the prescriptive commitments held by everyone, and is hence likely admissible as a linking commitment.

So all legislators representing TCM can derive the output commitment OUT "allergy sufferers may use acupuncture at their own expense" as follows:

H (TCM, $PRSC^{TCM}$) ➢ H (TCM, $DESC^{TCM}$) & H (TCM, $LINK^{TCM}$)

H (TCM, $DESC^{TCM}$) ➢ H (L, $DESC^{TCM}$)

H (NTCM, $*DESC^{TCM}$) ➢ H (L, $*DESC^{TCM}$)

∀ X H (X, $LINK_2$) ➢ E (L, $LINK_2$)

H (L, $DESC^{TCM}$) & H (L, $*DESC^{TCM}$) ➢ E (L, $DESC_{ECC}$)

E (L, $DESC_{ECC}$) & E (L, $LINK_2$) ➢ E (L, OUT).

Analogously, all legislators representing NTCM can derive the output commitment OUT as follows:

H (NTCM, $*PRSC^{TCM}$) ➢ H (NTCM, $*DESC^{TCM}$) & H (NTCM, $LINK^{NTCM}$)

H (NTCM, $*DESC^{TCM}$) ➢ H (L, $*DESC^{TCM}$)

H (TCM, $DESC^{TCM}$) ➢ H (L, $DESC^{TCM}$)

∀ X H (X, $LINK_2$) ➢ E (L, $LINK_2$)

H (L, $DESC^{TCM}$) & H (L, $*DESC^{TCM}$) ➢ E (L, $DESC_{ECC}$)

E (L, $DESC_{ECC}$) & E (L, $LINK_2$) ➢ E (L, OUT).

Since all legislators can derive the output commitment OUT in a way that reflects their respective input commitments, it is adequate to the conflicting

commitments of all the legislators and hence of all the members of the population whom they represent.[267]

5.4.5 Checking output commitments for adequacy

In the preceding subsections, we have shown how to derive an adequate law from conflicting descriptive input commitments. But given a law, how can we check whether that law is adequate to the set of input commitments? We could check one by one whether it is possible to derive the law from each input commitment; but generally, it suffices to check whether the law is *incompatible* with any of the input commitments. While this does not show that the law is actually *derived* from a given input commitment, it does show that the law is in principle *derivable* from the input commitment, if the output commitment bears some substantive relation to the input commitment.[268] Compatibility as verified by this procedure is thus a *necessary*, but not a *sufficient*, condition for adequacy. The following test checks whether a law is in principle derivable from a given input commitment in this sense.

Generally speaking, none of the commitments endorsed by the legislature may preclude entitlement to any other commitment held by the legislature. If a commitment endorsed by the legislature were to preclude entitlement to any other legislative commitment (all of which are derived from at least some of the input commitments), this would contradict the normative conception of pluralism.

This can be represented symbolically as follows, for a given commitment C:

H (L, C) / E (L, *C).

Recall that H (L, C) is not incompatible with H (L, *C), i.e., the legislature may *hold* the incompatible set of commitments {C, *C}. But if the legislature holds a commitment (i.e., if any of the legislators hold a commitment that serves as input to the legislative process or an intermediate commitment derived from the input commitments), then the legislature is not entitled to *endorse* any commitment incompatible with that commitment.

Adequacy is a special case of this general rule: where a law is *adequate* to the input commitments to the legislative process, none of the output commitments expressed by that law may be incompatible with any of the input commitments. If the legislature were entitled to endorse an output commitment incompatible with an input commitment, then the law expressing that output commitment would not be adequate to the input commitment – which would violate the normative conception of pluralism.

Informally speaking, an adequate law accepts the possibility that either of two mutually incompatible (descriptive) input commitments may be true.

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[267] Note that in this example, the respective linking commitments $LINK^{TCM}$ and $LINK^{NTCM}$ are not used as premises for the justification of OUT; but they may very well be used as premises for the justification of further output commitments that are consistent with OUT.
[268] See the discussion on p. 52 and in n. 117.

The law expressing the output commitment OUT "allergy sufferers may use acupuncture at their own expense" developed in the TCM cases above is adequate (in this simplified sense), since OUT is not incompatible with either $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" or $*DESC^{TCM}$ "acupuncture is not an effective remedy against allergies" – even though $DESC^{TCM}$ is incompatible with $*DESC^{TCM}$. Nothing can be inferred from OUT about whether acupuncture is an effective remedy against allergies or not. Informally speaking, OUT accepts the possibility that either $DESC^{TCM}$ is true or that $*DESC^{TCM}$ is true.

Or take abortion: an adequate law on abortion *must* accept the possibility that $DESC^{PL}$ "human life begins at conception," but it *must also* accept the possibility that $DESC^{PC}$ "human life begins at viability."[269] An example of such a law might express the output commitment OUT_1 "abortions after viability shall be prohibited" (not: "*only* abortions after viability shall be prohibited"), which would not specify whether abortions performed before viability shall also be prohibited. Another example of such a law might express the output commitment OUT_2 "destruction of any embryo or fetus without the consent of the woman carrying the embryo or fetus shall be prohibited," which would not specify whether the act shall also be prohibited if the woman carrying the embryo or fetus does give her consent.

If endorsement of an output commitment precludes entitlement to an input commitment, then the law expressing that output commitment is not adequate to the input commitment. If endorsement of an output commitment does *not* preclude entitlement to an input commitment, then the law expressing that output commitment is in principle *derivable* from that input commitment, even if it is not *actually derived* from the input commitment. This means that the law is at least in principle adequate to the input commitment.

5.5 Bridging the gap

Section 5.1 in this chapter showed how a population's prescriptive commitments can be decomposed into descriptive commitments and linking commitments, in order that the (perhaps controversial) descriptive components and the (uncontroversial) prescriptive linking components may serve as input to the legislative process under the justificatory constraint of law as pluralism. Sections 5.2 to 5.4 showed how distinct descriptive commitments – whether fundamental descriptive commitments or subsidiary descriptive commitments translated from fundamental or subsidiary prescriptive commitments – can serve as justifications for the same law, even where those distinct descriptive commitments conflict with each other. In other words, the chapter has shown how a consistent law can be adequate to an inconsistent set of fundamental commitments held by the population bound by that law.

[269] In this simplified example where these are the only descriptive popular commitments held by the legislators; other commitments might include variants such as "human life begins at implantation of the embryo in the uterus," "human life begins after the twelfth week of pregnancy," "human life begins at birth," and the like.

This goes some way toward implementing the aspiration expressed by Kwame Anthony Appiah in this paper's third epigraph: "We can live together without agreeing on what the values are that make it good to live together; we can agree about what to do in most cases, without agreeing about why it is right."[270] There may be profound disagreement on fundamental commitments (such as the reasons *why* a law is right), but a consistent law (i.e., agreement about *what* a law should be) may nevertheless be found. We have also progressed some way toward eliminating the premises that serve as conversation-stoppers in legislative negotiations, without going so far as to eliminate *all* controversial fundamental commitments as premises,[271] thus facilitating the aspiration of living and legislating together in a pluralistic society, without necessarily ever coming to an agreement on fundamental values.

These are major steps toward the overarching goal of this paper – but much work remains to be done. Firstly, we have so far only shown how a relatively special class of laws can be justified in this way, namely where there are easily identifiable and fairly strong, uncontroversial linking commitments available to bridge the gap from the conflicting descriptive input commitments to the law. In many, if not most, cases, linking commitments of that special sort will not be available; linking commitments may be limited to the (weak) lowest common denominator of the legislators' prescriptive commitments. Many classes of laws that we would wish to see in practice have thus been left out so far. Secondly, we have so far neglected the *multi-level* nature of legislation, i.e., the paper's third methodological premise set out in subsection 1.5.3 and the stipulation of the normative goal in section 1.2 that laws be adequate to the commitments held by the members of the population *in the respective legislative jurisdiction.* Instead, we have simplified matters and assumed that all laws are negotiated and adopted by a single legislature operating at a single level, i.e., that the laws adopted by that legislature and only the laws adopted by that legislature are universally binding upon the entire population. These two neglected points are closely related to each other, and the following chapter on "Recursive pluralism" will show how extending the tools we have developed so far to include *multiple levels of laws* can help extend the class of linking commitments used to bridge the gap between a population's fundamental commitments and the laws that bind it.

This should help master the challenges derived from the other two of this paper's epigraphs: namely how to undertake joint projects not only when there is disagreement on fundamental commitments, but also when mutual understanding about what commitments *mean* is only partial and limited.[272]

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[270] Appiah 2006, 71, cited also on p. 2. Ramadan 2004, 93, makes this distinction nicely in terms of the "why" versus the "how" of identity: "Muslim identity is a response to the question: 'Why?,' while national identity is a response to the question: 'How?," and it would be absurd and stupid to expect geographical attachment to resolve the question of being." The legislative process under law as pluralism is concerned with legislating the "how" of living together, not the "why" – of anything.

[271] Cf. Rorty 1999, 173, discussed also on pp. 78 and 79.

[272] Cf. Brandom 2000, 363, and Connolly 1993, 40, cited on p. 2.

6 Recursive pluralism

6.1 Single-level and multi-level legislative processes

So far, we have discussed a simplified version of the legislative process, in which an entire population is represented by a single legislature and only a single legislature, which has exclusive authority to negotiate and adopt all laws that will bind that entire population. This is, in fact, a simplification often implicitly or explicitly adopted by works of political and legal philosophy, especially those coming from a rationalist Enlightenment tradition.[273] Whether reason is understood individualistically[274] or communicatively,[275] a given legislative problem is often implicitly or explicitly assumed to have a *right answer* that can be obtained through sustained exchange of opposing viewpoints.[276] While theorists generally concede that

[273] To mention only some of the classics in the field: Rawls 1999a and Rawls 2005, Habermas 1996, Hart 1994, Ely 1980, Raz 2009, and Dworkin 1986 largely ignore federalism, subsidiarity, and other forms of multi-level lawmaking, or treat them as a historical contingency or an inconvenient afterthought. (One of the more intriguing of those afterthoughts is Dworkin 1986, 186, where Dworkin attempts to save his "law as integrity" from the threat of federalism: "Some scholars and politicians opposed to the Supreme Court's 1973 abortion decision now argue that the Constitution should be understood to leave decisions about abortion to the various states, so that some could permit abortion on demand, others prohibit it in all circumstances, and others adopt intermediate regimes. That suggestion is not itself a checkerboard solution: each state would retain a constitutional duty that its own statute be coherent in principle, and the suggestion offers itself as recognizing independent sovereigns rather than speaking for all together. But a question of integrity remains: whether leaving the abortion issue to individual states to decide differently if they wish is coherent in principle with the rest of the American constitutional scheme, which makes other important rights national in scope and enforcement.") Two recent major compilations of papers in legal philosophy, Coleman and Shapiro 2002 and Mootz 2009, waste nary a word on the subject. Where such arrangements are considered in some detail (as in Kelsen 1945, 303-327), they are generally discussed as a form of separation of powers or as a purely administrative arrangement. This also appears to have been the approach taken by the drafters of the paradigmatic federal constitution, namely that of the United States; see Rakove 1996, 52: "[Madison's] constitutional theory rested on a more profound insight into the nature of legislative power itself. The most striking qualities of legislative power, he now understood, were its plasticity and suppleness, its resistance to neat classification or limitation, and thus its capacity to extend its reach. This insight allowed Madison to approach the distinct issues of federalism and separation of powers as complementary aspects of one fundamental problem." There is, of course, much work done on federalism, subsidiarity, and other multi-level lawmaking arrangements (see, e.g., Goodwin 1995, Everett 1997, Elazar 2001, Frey 2001, and pretty much anything written about the European Union), and supreme courts in federalist states regularly deal with the topic (*Virginia v. Sebelius* is the current hot federalism case in the United States), but this has done little to encourage a multi-level conception of law as an integral part of legal philosophy. This may be changing, however, due to the increasing interest in the confluence between international law and constitutional law: even Rawls 1999b and Habermas 2008, 312-352, have taken a half-hearted stab at the topic. For an excellent recent treatment of these issues, especially as they relate to pluralism, see Krisch 2010; for a sophisticated philosophical analysis, see Rosenfeld 2008. For an analysis of federalism and subsidiarity as applied to contemporary legal interpretation and adjudication, see Breyer 2010, 121-136. See also the discussion of legal pluralism in n. 72 on p. 28.

[274] See, e.g., Kant 1787, Kant 1788, Kant 1796/2007, Rawls 1999a, and Rawls 2005.

[275] See, e.g., Habermas 1984 and Habermas 1993.

[276] This is notoriously Dworkin's view also with regard to *legal interpretation*, e.g., in Dworkin 1985. At issue here is not interpretation, however, but rather the general Enlightenment sentiment that the right solution can be found to any given problem through reason.

consensus is often unachievable in practice[277] and must be cut short by, say, a majority vote, this concession is seen as a necessary practical evil, while they contend that *in theory*, a rational consensus would eventually be found.[278] The systems of legislative decision-making on which these theories are based often reflect these assumptions, and cut-off mechanisms such as majority votes are often a non-theoretically motivated afterthought.[279] Given these theoretical assumptions, the focus on a single-level legislature adopting laws binding the entire society makes sense: if there is only a single right answer, then there might as well be only a single legislature to find it.

Critics of the rationalist Enlightenment tradition often contend that there is no single right answer, but rather that the outcome of legislative negotiations will reflect the cultural prejudices,[280] traditions,[281] power relations,[282] economic relations,[283] and other contingent constellations of the respective legislatures and societies. Instead of a right answer, legislatures just happen to output an answer that corresponds to the particular cultural, power, and economic dynamics of the legislature. While some theorists see this as a regrettable fact about the world,[284] others adopt an avowedly ethnocentric view and argue for exclusive national or local control of legislative matters by culturally homogeneous populations.[285] But once the appropriate, ethnically or culturally sufficiently homogeneous level is found, these theorists again often implicitly or explicitly work with single-level models of legislative decision-making appropriate to their preferred level.

This paper takes no position on whether the rationalist Enlightenment tradition is right or wrong on this matter, or whether the culturally contingent

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[277] Rawls's "burdens of judgment" in Rawls 2005, especially 54-58, are a concession that convergence upon a right answer, say regarding the conception of justice articulated in Rawls 1999a, is regrettably unlikely in practice, in light of the cognitive limitations even of reasonable persons. But as Waldron 1999a, 105-106, points out: "Liberals do a good job of acknowledging [disagreement], so far as comprehensive views of religion, ethics, and philosophy are concerned. Thus John Rawls insists that 'a diversity of conflicting and irreconcilable comprehensive doctrines' is 'not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy'. And he says it is therefore fortunate that we do not need to share a common view in society about religion, ethics, and philosophy. But liberals have done a less good job of acknowledging the inescapability of disagreement about the matters on which they think we *do* need to share a common view, even though such disagreement is the most prominent feature of the politics of modern democracies." On the issue that matters most to Rawls (namely, the development of a political conception), he falls back into Enlightenment convergence thinking.

[278] This is of course what motivates inquiry in the natural sciences as well; C. S. Peirce's theory of truth as the ideal point of convergence of inquiry is a popular way of thinking about both scientific and political problem-solving. See Burch 2010.

[279] But for a philosophical defense of the majority vote, see Waldron 1999a, 113-114.

[280] Even where viewed in a positive light, such as Rorty's liberal, benign "ethnocentrism"; see, e.g., Rorty 1991, 203-210.

[281] A line pursued prominently by communitarian critics of liberalism, such as MacIntyre 2007 and Taylor 2007.

[282] See, e.g., Lukes 1974.

[283] The theory underlying the *Bipartisan Campaign Reform Act of 2002*, largely discounted by *Citizens United v. Federal Election Commission*.

[284] Critical Legal Studies generally falls into this camp; see Unger 1986. See also Marx 1848.

[285] This view is implicit or explicit in the fear of globalization, internationalization, Islamization and other –izations that are purported to undermine, say, the (Judeo-)Christian or the secular or (paradoxically) the Enlightenment tradition of a culturally more-or-less homogeneous Western Europe, however that homogeneity might be defined. See, e.g., Hitler 1925/26, Mölzer 2006, Sarrazin 2010.

ethnocentrists will carry the day – it merely contends that the legislative process should not take a position on that controversy, either. Law as pluralism observes that as a matter of fact, full consensus – in the sense of full agreement on which course of legislative action should be taken, and on what reasons motivate that course of action – is seldom achieved, and that popular commitments are only imperfectly changed, if at all, in the course of legislative negotiations.[286] Although it may be surmised that legislative debates might play a useful educational role in shaping a society's attitudes,[287] it should not be forgotten that the primary role of legislatures is *legislative*, not *educational*, and that legislatures ought to be designed accordingly.[288]

So the question remains: if full consensus cannot be achieved in a legislature, what should the cut-off mechanism be to ensure that laws can nevertheless actually be adopted, rather than debated ad infinitum? A majority vote (or a two-thirds vote or other supermajority mechanism) is certainly one possibility – but if there is a theoretically motivated goal of achieving *adequacy* of laws to *all* input commitments, then a majority (or supermajority) vote privileges the commitments of those legislators who win the vote and deprivileges the commitments of those who lose the vote. Votes on matters where there is fundamental disagreement always lead to inadequate legislation, in the technical sense of the term used in this paper.

Given the goal of adequacy, the preferred cut-off mechanism under law as pluralism must be something other than a vote. While at some point, a vote may nevertheless be necessary on purely practical grounds,[289] law as pluralism is interested in pushing consensus as far as it goes *without* the assumption that full consensus can even theoretically ever be obtained or that the fundamental commitments of members of the population will in practice ever be changed. Law as pluralism takes the fundamental commitments of the population as they are, assumes that they may be immutable for better or for worse, and asks what kind of legislative process will lead to legislation that is adequate to those unchanging, controversial fundamental commitments of the population, yet will still be able to regulate the full range of human affairs that legislation is commonly expected to regulate.

The third methodological premise of this paper, articulated in subsection 1.5.3, is that a *multi-level* legislative process opens the door to legislation that is adequate in this way. The tool for implementing this process will be *recursive pluralism*, which aims to achieve *tight and loose consensus*. The relationship between tight and loose consensus is the topic of the following section.

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[286] But see the hopes to the contrary referenced in n. 171 on p. 70.

[287] One of the premises of *Mr. Smith Goes to Washington* and the more recent filibuster by U.S. Senator Bernie Sanders. See Buchman and Foster 1939 and Sanders 2010.

[288] This is a prescriptive commitment of this paper, but a prescriptive commitment one may hope is shared by anyone interested in designing a legislature for a pluralistic society. In any event, it is one way of expressing the *commitment to pluralism*.

[289] In particular with respect to *enforceability*; this will be explored in more detail in section 6.7 on "Termination conditions."

6.2 Tight consensus and loose consensus

6.2.1 Sufficiently vs. insufficiently specified laws

In legislative negotiations, legislators (either individually or in groups) propose and support laws. In justifying why a proposed law should be adopted, the supporters of the proposal give reasons why they themselves endorse the commitments expressed in that proposal and reasons why other legislators should endorse those commitments. Opponents of the proposal in turn give reasons why they themselves do not endorse those commitments and reasons why other legislators should not endorse them. As debate on the proposed law proceeds, legislators may ask each other for additional reasons why the commitments expressed by the proposed law should be endorsed or not. In the course of these negotiations, alternate laws may be proposed. Ultimately, some proposal expressing a set of output commitments will be adopted and hence endorsed by the legislature as a law – assuming the legislative process reaches a definitive conclusion.

Under the justificatory constraint of law as pluralism, the fundamental commitments admitted as justifications may be prescriptive only if they are uncontroversial, and descriptive even if they are controversial.[290] Under the regulatory ideal of law as pluralism, the laws expressing output commitments must be adequate to the fundamental commitments of the population bound by those laws. Since the justificatory constraint of law as pluralism screens out controversial prescriptive commitments and hence generates a set of input commitments that is inconsistent only with regard to *descriptive* commitments, the legislative process achieves the goal of adequacy by ensuring that the output commitments reflect (i.e., are compatible with and derived from) the *entire* set of input commitments. As we have seen, this may provide only a thin basis for output commitments, especially if the set of uncontroversial linking commitments is small or weak.

In particular, doubts may arise as to the *enforceability* of the laws generated by the pluralistic legislative process. If the only adequate output commitment generated by the legislative process is something like "human life shall not be aborted," without further specification of what "human life" means, then enforcement of the law expressing such an output commitment is impossible. This is especially the case where the law includes terms expressing *essentially contested concepts* that are not further defined.[291] Essentially contested concepts

[290] Recall that this paper is only interested in *fundamental* commitments and *subsidiary* commitments derived from fundamental commitments. Commitments that are not fundamental or derivable from fundamental commitments, i.e., based on differences in economic and social standing, gender, age, race, language, sexual orientation, family circumstances, and other contingent characteristics, always pass through the screen of the justificatory constraint of law as pluralism.

[291] See n. 152 on p. 62 above on Gallie's original definition of essentially contested concepts. Hurley 1989, 46-47, defines and refines essentially contested concepts as follows: "These are concepts that characteristically admit of substantive disagreement. Gallie describes essentially contested concepts as appraisive and applicable to objects of an internally complex character that may be described in various ways by altering one's view of the significance of descriptions of their component features. […] [C]orrect descriptions of component features characteristically compete with one another to influence applications of [essentially contested concepts]. Examples are the general concepts of what ought to be done, all things considered,

arise when the *same* concepts are used in different ways by different legislators (and the members of the population they represent) who hold conflicting fundamental commitments relevant to the definition of those concepts.

On the other hand, if the set of uncontroversial linking commitments is sufficiently large or strong (or if the controversies surrounding descriptive input commitments are minor), then the pluralistic legislative process may very well generate enforceable laws expressing output commitments such as "allergy sufferers may use acupuncture at their own expense," "abortions after viability shall be prohibited," "abortions after conception shall be prohibited," and so on. The terms in such laws are *sufficiently specified* for the law to be enforceable.[292]

Laws outputted by the pluralistic legislative process may thus be *sufficiently specified* and hence *enforceable*, or they may be *insufficiently specified* and hence *unenforceable*. Where laws meet the former criterion, we will say that they enjoy **tight consensus**; where laws meet the latter criterion, we will say that they enjoy (merely) **loose consensus**. This gives us the following precise definitions:

> A law enjoys **tight consensus** where, given an inconsistent set of relevant input commitments, the output commitments reflect that inconsistent set and are hence adequate to them, and the law expressing the output commitments is *sufficiently* specified.[293]

In contrast:

> A law enjoys **loose consensus** where, given an inconsistent set of relevant input commitments, the output commitments reflect that inconsistent set and are hence adequate to them, but the law expressing the output commitments is *insufficiently* specified.

Analogously, we will also say that an adequate *output commitment* enjoys tight consensus when it is sufficiently specified, and that it enjoys loose consensus when it is insufficiently specified.

Both laws enjoying tight consensus and those enjoying loose consensus are adequate to their (inconsistent) sets of input commitments, but only laws enjoying tight consensus are sufficiently specified.

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and of what the law requires, all things considered, as well as many specific ethical and legal concepts." It is this sort of concept that makes enforceability especially problematic.

[292] Assuming that there is agreement on the definition of "abortion," "viability," and "conception." Defining these terms is not generally what gives rise to controversy; what is controversial is *which* abortions ought to be permitted, given commonly agreed definitions of these terms. This differs from the example of "effective remedy against allergies" discussed in subsection 5.4.3 above, where the term does not refer to the same things for different people.

[293] Due to contingent characteristics such as those referred to in n. 290 (such as conflicting interests or purely political reasons), the law may still not enjoy *full* consensus, but this is irrelevant to the special problems arising under law as pluralism as opposed to law as particularism.

6.2.2 What it means for a commitment to mean the same thing

For a law to be sufficiently specified, i.e., for the law to enjoy tight consensus, the output commitments expressed by that law must *mean the same thing* to every legislator. Conversely, output commitments expressed by a law enjoying (merely) *loose* consensus *mean different things* to different legislators.

What does it mean for a commitment to *mean the same thing* to different legislators (and the members of the population they represent)? One way to understand the meaning of a commitment is to look at the inferential roles it plays: a commitment C means the same thing to two persons if it plays the same role in the *giving and asking of reasons* by those persons, i.e., if C plays the same inferential role as a *premise* in the justifications offered by those persons, and if C plays the same inferential role as a *conclusion* in the justifications offered by those persons.[294] Each legislator attributes the same (relevant) premises and conclusions to the other legislator as that legislator acknowledges herself. Or in other words: the two sets of books kept by each legislator line up fully with each other.[295]

But under law as pluralism, we know that a given output commitment may have been derived from *inconsistent* input commitments, i.e., the output commitment plays a different inferential role *as a conclusion* for different legislators holding different popular commitments that serve as input commitments. For instance, a legislator holding $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" derives OUT "allergy sufferers may use acupuncture at their own expense" in a different way from a legislator holding $*DESC^{TCM}$ "acupuncture is not an effective remedy against allergies." This results in a slightly different inferential role and hence a slightly different *meaning* of OUT for each of these legislators. As we saw above in the original discussion of allergy sufferers in subsection 4.6.3, this may manifest itself in a slight difference in emphasis with respect to OUT: a legislator holding $DESC^{TCM}$ may emphasize the phrase "allergy sufferers may use acupuncture," while a legislator holding $*DESC^{TCM}$ may emphasize the phrase "(but only) at their own expense." These kinds of differences in (shades of) meaning arise whether an output commitment enjoys tight or loose consensus; they are, in

[294] This expressly endorses a pragmatic (and pragmatist) understanding of meaning, i.e., the meaning of a commitment is explained in terms of its use. This is the approach taken by Brandom (1994, xii): "One of the overarching methodological commitments that orients this project is to explain the *meaning* of linguistic expressions in terms of their *use* – an endorsement of one dimension of Wittgenstein's pragmatism." Brandom goes on to explain this aspect of Wittgenstein's approach as follows (1994, 13): "The starting point of his investigations is the insight that our ordinary understanding of states and acts of meaning, understanding, intending, or believing something is an understanding of them as states and acts that *commit* or *oblige* us to act and think in various ways. To perform its traditional role, the meaning of a linguistic expression must determine how it would be *correct* to use it in various contexts. To understand or grasp such a meaning is to be able to distinguish correct from incorrect uses." Brandom proceeds to explain such correct and incorrect uses in terms of the inferential role played by expressions as premises and conclusions.

[295] See subsection 5.2.2 on what it means for a given legislator to keep one set of books on her own commitments and entitlements, and one set of books on the *legislature's* commitments and entitlements. The same principle of double bookkeeping applies when a given legislator keeps one set of books on her own commitments and entitlements, and one set of books on *another legislator's* commitments and entitlements.

fact, a crucial tool allowing legislatures to get their job done.[296] What we are interested in here instead is the difference in meaning that arises when an output commitment serves as a *premise* for further commitments; in other words: when the two sets of books diverge with respect to the committive and permissive inferences of a given output commitment.[297]

Depending on the *collateral commitments* a person holds, i.e., depending on the *circumstances of application*, the inferential role of a commitment as a premise may differ.[298] For instance, if I hold the commitment C "Socrates is a man" as a premise, I will draw different conclusions regarding the goodness of Socrates depending on whether I hold the collateral commitment CC_1 "men are good" or the collateral commitment CC_2 "men are evil." My commitment C *means* something else depending on whether I hold CC_1 or whether I hold CC_2: in the former case, I mean (among other things) that Socrates is good; in the latter case, I mean (among other things) that Socrates is evil. Depending on my collateral commitments, the *interpretation* of my commitments serving as premises may differ.

This is particularly salient in the case of *prescriptive* commitments – the genus of which (most) output commitments are a species. Where the inferential role of an output commitment as a premise differs, the law expressing that output commitment is open to different *interpretations*, which in turn impacts the *enforceability* of the law. Without further specification, the law may even be *unenforceable* if the interpretations differ too strongly.

Accordingly, where an output commitment plays the same inferential role *as a premise* for *all* legislators, the law expressing that output commitment is *interpreted* in the same way by all legislators. The output commitment means the *same thing* (with regard to its conclusions) for all legislators. Where the law is thus *enforceable* without further specification,[299] it enjoys *tight consensus*.

Conversely, where an output commitment plays *different* interferential roles as a premise for different legislators, the law expressing that output commitment is interpreted in different ways by different legislators. The output commitment does not mean the same thing (with regard to its conclusions)

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[296] Marmor 2008 makes a similar point, building on Gricean implicatures and maxims.

[297] By making these differences explicit, we are moving from what Triandis 2006, 26, calls "unconscious incompetence" to "conscious competence:" "When people come into contact with members of other cultures, they are often not aware of their miscommunications, because they think that the others are more or less like they are. This is the stage of *unconscious incompetence.* After some interpersonal difficulties, people realize that they are miscommunicating, but they do not know exactly what is wrong. That is the stage of *conscious incompetence*. As they get to know more and more about the culture of the other, they begin communicating correctly, but they have to make an effort to communicate in a different way. That is the stage of *conscious competence*. Finally, after they develop habits of correct communication with members of the other culture, they reach the stage of *unconscious competence*, where the communication is effortless and correct." It is the aspiration of law as pluralism that legislators attain *conscious competence* in their negotiations under conditions of conflicting fundamental commitments; but *unconscious competence* may be too much to ask.

[298] See Brandom 2000a, 62-66, for a concise account of circumstances and consequences of application, drawing on Dummett.

[299] There may still be *practical* obstacles to enforcement, but these obstacles would not be due to differences in how the law is interpreted. This will be discussed in more detail in subsection 6.7.3 on "Failure to achieve enforceability in practice."

for all legislators. Where the law is thus not enforceable without further specification, it enjoys merely *loose consensus*.

Take, for instance, the law expressing the output commitment OUT_{VIA} "all abortions after viability shall be prohibited," and assume that this law reflects the descriptive commitments of all the legislators. Assume further that none of the terms used in this law refer to an essentially contested concept.[300] Then the following relationship obtains for any legislator X, any legislator Y, and any relevant[301] commitment C:

$(H (X, OUT_{VIA}) \succ H (X, C)) \rightarrow (H (Y, OUT_{VIA}) \succ H (Y, C))$.

In words: legislator Y is entitled draw the same conclusions from OUT_{VIA} as X is entitled to draw. For instance, by holding OUT_{VIA} as a premise, X is entitled to hold the commitment "fetuses in the 30th week of pregnancy may not be destroyed." By holding the same premise, Y is entitled to draw the same conclusion. If this is true of all relevant conclusions derived from OUT_{VIA} as a premise, OUT_{VIA} *means the same thing* for Y as it does for X, and the law expressing OUT_{VIA} is enforceable. The law expressing OUT_{VIA} therefore enjoys *tight* consensus.

In contrast, consider the law expressing the output commitment OUT_{HL} "human life shall not be aborted," and assume that this law reflects the descriptive commitments of all the legislators. Assume further that the term "human life" used in this law refers to an essentially contested concept. Then the following relationship obtains for any legislator X, any legislator Y, and any relevant commitment C:

$\sim((H (X, OUT_{HL}) \succ H (X, C)) \rightarrow (H (Y, OUT_{HL}) \succ H (Y, C)))$.

In words: legislator Y may not be entitled to draw the same conclusions from OUT_{HL} as X is entitled to draw. For instance, if X holds the collateral commitment "human life begins at conception," then by holding OUT_{HL} as a premise, X is entitled to hold the commitment "fetuses in the 15th week of pregnancy may not be destroyed" as a conclusion. But if Y holds the collateral commitment "human life begins at viability," then by holding the same premise, Y is not necessarily entitled to draw the same conclusion. OUT_{HL} thus *does not mean the same thing* for Y as it does for X, and the law expressing OUT_{HL} is not enforceable. The law expressing OUT_{HL} therefore enjoys merely *loose* consensus.

Where all legislation is negotiated and adopted at a single legislative level, the laws enjoying loose consensus under conditions of conflicting fundamental commitments are not enforceable, since they are insufficiently specified. This would seem to limit (enforceable) law as pluralism to laws that enjoy tight consensus as opposed to loose consensus – but this would be a very thin basis for enforceable legislation, given how hard it is to achieve strong output

[300] I.e., everyone agrees on what "abortion" and "viability" (and "prohibited") mean.
[301] There are any number of irrelevant commitments X may be entitled to hold as a consequence of holding OUT_{VIA}; we are concerned only with those conclusions that bear some substantive relation to the premise. See the comment in n. 117 on p. 51.

commitments enjoying tight consensus when deriving them from an inconsistent set of input commitments.

By introducing multiple legislative levels, laws enjoying loose consensus can be made enforceable, even though they are unenforceable at a single level – thus considerably expanding the basis for enforceable legislation under law as pluralism.

6.3 Consensus across multiple legislative levels

6.3.1 Making loose consensus tight

Consider a twist on the story about our allergy sufferers. Say again that the population is split into two subsets, TCM and NTCM, where TCM holds the descriptive commitment $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" and NTCM holds the incompatible descriptive commitment $*DESC^{TCM}$ "acupuncture is not an effective remedy against allergies." But now say that the *only* shared linking commitment is LINK "allergy sufferers may only use effective remedies against allergies" – LINK is the lowest common denominator of TCM's and NTCM's relevant prescriptive commitments.

Then TCM can argue:

H (L, $DESC^{TCM}$) & H (L, LINK) ➢ H (L, INT^{TCM}), where INT^{TCM} is TCM's proposal for the output commitment "allergy sufferers may use acupuncture against allergies"

and NTCM can argue

H (L, $*DESC^{TCM}$) & H (L, LINK) ➢ H (L, INT^{NTCM}), where INT^{NTCM} is NTCM's proposal for the output commitment "allergy sufferers may not use acupuncture against allergies."

But now INT^{TCM} is incompatible with $*DESC^{TCM}$ & LINK, and INT^{NTCM} is incompatible with $DESC^{TCM}$ & LINK. Hence, neither INT^{TCM} nor INT^{NTCM} is *adequate* to all of the descriptive input commitments, and neither of them enjoys loose consensus. In this case, in fact, there is *no* output commitment adequate to all of the descriptive input commitments except OUT "allergy sufferers may only use effective remedies against allergies," which is equivalent to the lowest common denominator, the linking commitment LINK.

But OUT only enjoys *loose* consensus, since it means different things to TCM and NTCM. The term "effective remedies against allergies" refers to an essentially contested concept, and TCM and NTCM will draw different conclusions from OUT as a premise: since TCM holds the collateral commitment that acupuncture is an effective remedy against allergies, TCM will infer that acupuncture may be used against allergies. And since NTCM holds the collateral commitment that acupuncture is not an effective remedy against allergies, NTCM will infer that acupuncture may not be used against allergies. The law expressing OUT is thus insufficiently specified and hence

unenforceable. It cannot serve as a guide for human conduct, since it is nowhere specified what "effective remedies against allergies" means in the context of OUT.

By introducing multiple legislative levels, the scope of enforceable laws enjoying loose consensus expands considerably. To see why this is so, take a population P consisting of two subsets TCM and NTCM holding the same commitments as before. Instead of postulating a single legislature with a monopoly on the negotiation and adoption of all laws binding all members of P, say that there are three legislatures at two levels: at the top level, there is a legislature L^{P} with the authority to negotiate and adopt laws binding all members of P; at the second-to-top level, there is a legislature L^{TCM} with the authority to negotiate and adopt laws binding all members of TCM, and a legislature L^{NTCM} with the authority to negotiate and adopt laws binding all members of NTCM.

As before, the only law enjoying loose consensus that can be adopted at the top level by L^{P} expresses the output commitment OUT^{P} "allergy sufferers may only use effective remedies against allergies," where the term "effective remedies against allergies" is not sufficiently specified. On its own, the law expressing OUT^{P} is thus unenforceable, as before.

In the legislature L^{TCM}, $*DESC^{TCM}$ "acupuncture is not an effective remedy against allergies" is not inputted to the legislative process, since $*DESC^{TCM}$ is not held by any members of the population bound by the legislative output of L^{TCM}. $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" is thus uncontroversial and can be *endorsed* by L^{TCM}. Any legislator in L^{TCM} may thus make the following legislative proposal:

$E (L, DESC^{TCM}) \& E (L, LINK) \rightarrow E (L, INT^{TCM})$, where INT^{TCM} is TCM's proposal for the output commitment "allergy sufferers may use acupuncture against allergies."

Conversely, in the legislature L^{NTCM}, $DESC^{TCM}$ "acupuncture is an effective remedy against allergies" is not inputted to the legislative process, since $DESC^{TCM}$ is not held by any members of the population bound by the legislative output of L^{NTCM}. $*DESC^{TCM}$ "acupuncture is not an effective remedy against allergies" is thus uncontroversial and can be *endorsed* by L^{NTCM}. Any legislator in L^{NTCM} may thus make the following legislative proposal:

$E (L, *DESC^{TCM}) \& E (L, LINK) \rightarrow E (L, INT^{NTCM})$, where INT^{NTCM} is NTCM's proposal for the output commitment "allergy sufferers may not use acupuncture against allergies."

In legislature L^{TCM}, INT^{TCM} enjoys tight consensus; and in legislature L^{NTCM}, INT^{NTCM} enjoys tight consensus: in both cases, the laws expressing the corresponding output commitments OUT^{TCM} and OUT^{NTCM} are sufficiently specified. In the legislative jurisdiction of L^{TCM}, OUT^{TCM} is therefore enforceable; and in the legislative jurisdiction of L^{NTCM}, OUT^{NTCM} is enforceable.

Not only that, however: *in the legislative jurisdiction of L^{TCM}*, OUT^{P} (in conjunction with $DESC^{TCM}$) is now likewise enforceable, *and in the legislative jurisdiction of L^{NTCM}*, OUT^{P} (in conjunction with $DESC^{NTCM}$) is also enforceable. The loose consensus that OUT^{P} enjoys at the level of L^{P} has been made tight in the jurisdiction of L^{TCM} by the descriptive commitment $DESC^{TCM}$, and it has been made tight in the jurisdiction of L^{NTCM} by the descriptive commitment $DESC^{NTCM}$. The term "effective remedies against allergies," which referred to an essentially contested concept at the level of L^{P}, now refers to an uncontested concept in each of the legislative jurisdictions of L^{TCM} and L^{NTCM}. Taking those legislative jurisdictions into account, the law expressing OUT^{P} is now sufficiently specified.

In this example, OUT^{P} & $DESC^{TCM}$ is equivalent to OUT^{TCM}, and OUT^{P} & $DESC^{NTCM}$ is equivalent to OUT^{NTCM}. The law expressing OUT^{P} & $DESC^{TCM}$, for instance, is thus equivalent to the law expressing OUT^{TCM}. The difference between the two only becomes apparent in relation to *which institutions participate in enforcement*: if the institutions at the level of L^{P} participate in the enforcement of the law (say, the judicial and executive bodies entrusted with the enforcement of legislation outputted by L^{P}), then it makes sense to speak of the law expressing OUT^{P} & $DESC^{TCM}$ as the law binding subset TCM of the population P; if not, then it makes sense to speak of the law expressing OUT^{TCM} as the law binding subset TCM of the population P. This distinction will be important in section 6.7 below on "Termination conditions." For now, note that in the former case, i.e., where the law expressing OUT^{P} & $DESC^{TCM}$ is the law binding TCM, it suffices for L^{TCM} to *endorse the descriptive commitment $DESC^{TCM}$* as an output commitment; there is no need for L^{TCM} to endorse OUT^{TCM}, paradigmatically by adopting a law expressing it.

6.3.2 Partially enforceable laws

In some cases, a law may enjoy tight consensus with respect to certain commitments expressed by the law, while it enjoys merely loose consensus with respect to other commitments expressed by the law. If the law is adopted at the highest legislative level, it is then only *partially* enforceable at that level. The rest of the law must be further specified at lower legislative levels in order to be enforceable at those levels.

Take, for instance, negotiations on a law at the highest legislative level L^{P} to ban the reproductive cloning of human beings.[302] Let us assume that cloning of human beings for "reproductive" purposes, as opposed to "therapeutic" or medicinal purposes, is condemned by all legislators and the members of the population they represent, hence agreement exists that a law should be drafted to prohibit it throughout the entire population P. Disagreement arises, however, with respect to when a purpose can be considered "reproductive";

[302] The highest (quasi-)legislative level is generally the level of the nation-state, but it may also be the level of a supranational organization such as the European Union or the United Nations. Cf. the non-binding *United Nations Declaration on Human Cloning*, which originally was intended as a binding international convention. The following discussion of this example is based on the corresponding debates in the Ad Hoc Committee on an International Convention against the Reproductive Cloning of Human Beings of the General Assembly of the United Nations.

"reproductive" is hence an essentially contested concept. For example, the relevant descriptive input commitments may include $DESC^{always}$ "cloning is always reproductive" and $DESC^{term}$ "cloning is reproductive only if the intent of the cloner is to bring the clone to term."[303] Since there are instances of cloning where the intent of the cloner is *not* to bring the clone to term (but rather, say, to develop a drug against Parkinson's disease), the set of input commitments {$DESC^{always}$, $DESC^{term}$} is inconsistent.

The output commitment OUT^{P}_{1} "cloning shall be prohibited if the intent of the cloner is to bring the clone to term" reflects the input commitments at the level of L^{P}: if the intent of the cloner is to bring the clone to term, then both those who hold $DESC^{always}$ and those who hold $DESC^{term}$ agree that the cloning must be prohibited. But if a law LAW expresses *only* that commitment OUT^{P}_{1}, and if LAW were to *allow* cloning if the intent of the cloner is *not* to bring the clone to term (such as in the Parkinson's drug scenario), then LAW is not adequate to the input commitment $DESC^{always}$ and will not be endorsed by those who hold it. For LAW to be adequate to the entire set of input commitments, LAW must therefore express OUT^{P}_{1} and a further commitment OUT^{P}_{2} that *leaves open the question* of what must be done if the cloner has no intent to bring the clone to term. LAW might therefore be phrased as "cloning shall be prohibited if the intent of the cloner is to bring the clone to term (OUT^{P}_{1}), and other forms of reproductive cloning shall likewise be prohibited (OUT^{P}_{2})." LAW is thus *sufficiently specified* with respect to scenarios in which the cloner has the intent to bring the clone to term (captured by the output commitment OUT^{P}_{1}), but it is *insufficiently specified* with respect to scenarios in which the cloner has no intent to bring the clone to term (captured by the output commitment OUT^{P}_{2}). LAW is thus *partially* enforceable at the level of L^{P}.[304]

What happens now in scenarios in which the cloner has no intent to bring the clone to term, but nevertheless clones an embryo? At the level of a legislature L^{always} (subordinate to L^{P}), whose output commitments are binding on those who hold $DESC^{always}$, this scenario would be considered reproductive cloning. By *endorsing* the descriptive commitment $DESC^{always}$ "cloning is always reproductive," L^{always} further specifies LAW and thereby prohibits all forms of cloning at the level of L^{always}. LAW is now sufficiently specified to be enforceable at the level of L^{always} and it enjoys tight consensus at that level.

Analogously, a legislature L^{term} (subordinate to L^{P} and coordinate to L^{always}), whose output commitments are binding on those who hold $DESC^{term}$, would further specify LAW by *endorsing* the descriptive commitment $DESC^{term}$ "cloning is reproductive only if the intent of the cloner is to bring the clone to term." This limits the prohibition of cloning at the level of L^{term} to scenarios in which the cloner has the intent to bring the clone to term. LAW is now sufficiently specified to be enforceable in the legislative jurisdiction of L^{term}, and it enjoys tight consensus in that jurisdiction.

---

[303] The commitment $DESC^{always}$ bears a resemblance to the commitment $DESC^{PL}$ "human life begins at conception" in the abortion debate, and in practice, these two commitments are in fact often jointly held. Conversely, $DESC^{term}$ is often held by those who believe that human life begins at some point after conception.

[304] At least to the extent that intent can be proven – a common enough problem in criminal law.

Note that L^{always} and L^{term} each endorse a *descriptive* commitment as an output commitment in this example. If there were only a single legislative level, this would be contrary to the prescriptive purpose of legislation: a descriptive commitment cannot constitute a guide for human conduct, even if it is endorsed by a legislature as an output commitment. If there are multiple legislative levels, however, endorsing a descriptive commitment may indeed constitute a guide for human conduct: namely in conjunction with the prescriptive output commitments already endorsed at a higher legislative level. $DESC^{always}$ ("cloning is always reproductive") endorsed as an output commitment by L^{always} alone does not constitute a guide for human conduct; but in conjunction with OUT^{P}_{2} ("other forms of reproductive cloning shall likewise be prohibited"), it does.

From the perspective of the entire legislative structure consisting of three legislatures at two levels, which covers the entire population P, LAW is both *adequate* to all the relevant popular commitments of the members of population P serving as input commitments, and it is sufficiently specified to be *enforceable*. LAW thus enjoys tight consensus *across population P*, even though not all of the output commitments it expresses enjoy tight consensus *at the level of* L^{P}. Without this multi-level legislative process, *no* relevant law would be adequate and enforceable across population P, and hence no relevant law would enjoy tight consensus. Where output commitments enjoying tight consensus at the level of L^{P} are at issue (in this case, OUT^{P}_{1}), the institutions at the level of L^{P} may participate in the enforcement of LAW; where output commitments enjoying merely loose consensus at the level of L^{P} are at issue (in this case, OUT^{P}_{2}), which are then further specified at lower legislative levels, the institutions at those lower levels may participate in the enforcement of LAW.

6.4 Multi-level laws

In the reproductive cloning example, LAW is a *multi-level law*, since it does not enjoy tight consensus at any given single level; it enjoys tight consensus only when considered from the perspective of the entire, multi-level legislative structure. At the level of L^{P}, LAW expresses the output commitments OUT^{P}_{1} and OUT^{P}_{2}, which are generated at the level of L^{P}; at the level of L^{always}, it expresses the output commitment $DESC^{always}$, which is generated at the level of L^{always}; and at the level of L^{term}, it expresses the output commitment $DESC^{term}$, which is generated at the level of L^{term}. The way we have defined output commitments and laws, output commitments are always *single-level*, i.e., they are the output commitments *only* of the legislators legislating at a given level and of the subsets of the population represented by those legislators. In contrast, laws may be *multi-level*, i.e., they may be outputted by *multiple legislative levels* working in concert and are *binding* on the entire population, not just on a subset of the population at a given level. They are in a sense *spread out* across all relevant legislative levels, while output commitments belong only to a single legislative level. This distinction helps explain why this paper has made such a big deal about speaking of laws as *expressing* output commitments, rather than simply conflating the two concepts. If there were only a single legislative level, it would be easy enough

to say that a law *is the same thing* as the set of output commitments endorsed by the legislature at that level.[305] But the matter is made more complicated by the existence of multiple legislative levels: a law tells us *which* sets of output commitments have been endorsed at *which* legislative levels.

In the following, we will represent this relationship between laws and output commitments more precisely as follows:

$$LAW = \{ \langle L^1, \Sigma OUT^1 \rangle, \langle L^2, \Sigma OUT^2 \rangle, \ldots, \langle L^n, \Sigma OUT^n \rangle \}$$

i.e., a law is a *set* of *pairs* containing a legislature and the set of output commitments endorsed by that legislature. Defined in this way, a law gives us all the information we need to determine which members of a given population P are bound by which output commitments., i.e., LAW is a *well-defined guide for human conduct*.

In the reproductive cloning example above, LAW can be represented as:

$$LAW = \{ \langle L^P, \{OUT^P_1, OUT^P_2\} \rangle, \langle L^{always}, \{DESC^{always}\} \rangle, \langle L^{term}, \{DESC^{term}\} \rangle \}$$

For any law LAW defined in this way, a given member M of the population P is bound by the output commitments that are paired with the legislatures to which M is subject.

We could, of course, define laws differently and stipulate that they apply only to a single legislative level and the subset of the population represented at that level. This is in fact the way laws are usually thought of: as emanating from a single legislature. In the example of reproductive cloning above, there would thus be three different laws: one binding the entire population P, one binding the subset of the population subject to L^{always}, and one binding the subset of the population subject to L^{term}. What is lost in this conception, however, is the close link between these separate laws due to their common subject matter (namely, the prohibition of reproductive cloning) – and more pertinently, the areas of considerable agreement across the population (namely, the desire to prohibit reproductive cloning, however defined). The possibility of *multi-level laws* does justice to the overarching goal of law as pluralism, namely to clearly separate out areas of agreement and areas of disagreement in a given population, and thereby to undertake the *joint* project of lawmaking even where mutual understanding is partial or limited – thus fulfilling the promises encapsulated in this paper's first and second epigraphs.[306] While the concept of multi-level laws is thus preferable for the purposes of this paper and will continue to be employed in the following discussion, nothing in this analysis hinges on it; one could just as well define law as pluralism without the concept of multi-level laws.

[305] Although we might still opt for the more complicated formulation for the following reason: while a commitment is something that can be undertaken privately or publically with or without endorsing it, a law is the written form that expresses the endorsement of that commitment. Laws are to output commitments what sentences are to propositions – with all the philosophical complications that analogy entails.

[306] See Brandom 2000, 363, and Connolly 1993, 40, cited on p.2.

That said, the following section shows how to generate multi-level laws using the device of *recursion*.

6.5 Recursion over multiple legislative levels

In the previous section, we described what a law looks like that is sufficiently specified and thus enforceable across *multiple* legislative levels as opposed to a *single* legislative level: at the top-most level, it enjoys tight consensus with respect to at most *some*, but not *all*, of the output commitments it expresses, while it enjoys merely loose consensus with respect to the other output commitments it expresses. The law must be *further specified* at lower legislative levels with respect to those other output commitments in order for it to be enforceable.

In this section, we will describe the multi-level legislative *process* or *algorithm* for generating such laws. This process – which we will refer to as *recursive pluralism* – will be implemented using a *recursive function* in which the overarching problem of the legislative process (namely, of how to generate adequate and enforceable output commitments for a given population) is solved by breaking it down into simpler subproblems of the same type (namely, of how to generate adequate and enforceable output commitments for subsets of that population).[307] Once defined, this function can be executed by the top-level legislature to generate the adequate and enforceable law as output.[308]

6.5.1 The output of the recursive function

For this purpose, we shall define the recursive function `legislate`, which, when executed at the top-most legislative level, returns a law LAW as its output:

[307] Although, by nature, a recursive function solves a problem from the top down, the recursive function defined here can be seen as an implementation of the bottom-up principle of subsidiarity, as described by Breyer 2010, 123, drawing on Millon-Delsol 1992: "Subsidiarity insists that governmental power to deal with a particular kind of problem should rest in the hands of the smallest unit of government capable of dealing successfully with that kind of problem. One begins by assuming that power to solve a problem should remain at the local level. One then asks whether it is necessary to abandon this assumption in order to resolve the problem. One can continue to ask this question, level by level. And one should answer it by climbing no higher up the governmental unit ladder than necessary to deal effectively with the problem." This is, in essence, a recursive definition of subsidiarity. But note that the emphasis of subsidiarity is on *effectiveness*, which is only one aspect of recursive pluralism; the main goal of recursive pluralism is to implement *adequacy* to fundamental commitments.

[308] This follows the second methodological premise articulated in subsection 1.5.2, namely that at least some aspects of lawmaking are *algorithmic*. The goal of the remaining sections in this chapter is to formalize those algorithmic aspects using functions defined in pseudocode (based mainly on C and some Pascal conventions), in order to describe them more precisely and concisely than would be possible in plain English.

```
legislate (…) {

    …

    return LAW
}
```

Note that given a set of input commitments, a legislative process is likely able to generate *several* potential laws in practice, rather than a *single* law (in particular since the justifications used in the legislative process are primarily *permissive* as opposed to *committive*). The output of the function `legislate` would therefore be more properly defined as a *set of laws*, namely the various options for enforceable laws that are adequate to the input commitments. For the sake of simplicity, the following discussion will omit this complication, but the algorithm defined here can easily be extended to account for the generation of multiple laws.[309]

As we have seen in the case of a single-level legislative process, laws negotiated at a single legislative level may be very restricted: they may reflect only the lowest common denominator of the various popular commitments serving as input commitments. While adequate, the law may not be enforceable, i.e., it may enjoy only loose consensus, or it may simply cover only a very limited range of scenarios one might want to regulate. Since, when executed at the top-most legislative level, our function `legislate` is supposed to output not only adequate laws, but also *enforceable* laws, the function may have no output if the legislative process takes place only at a single level. By expanding the legislative process to multiple legislative levels, the range of possible adequate laws enjoying tight consensus is expanded considerably, and hence the range of adequate and enforceable laws and the scenarios they cover. This increases the likelihood that `legislate` will actually generate an output.

If the problem of generating adequate and enforceable legislation cannot be solved exclusively at the top-most level, the unsolved parts of the problem are delegated to the subordinate legislative levels in order to find a full solution. In the example of reproductive cloning, the problem was to find a law prohibiting legislative cloning, given an inconsistent set of input commitments regarding the meaning of the essentially contested concept of "reproductive." While a law was generated at the top-most level that *partially* enjoyed tight consensus, the generation of the rest of the law was delegated to subordinate legislative levels. Some of the output commitments expressed by the law were derived only at the top-most level L^P (namely OUT^P_1 "cloning shall be prohibited if the intent of the cloner is to bring the clone to term," which enjoyed tight consensus at the level of L^P, and OUT^P_2 "other forms of reproductive cloning shall likewise be prohibited," which enjoyed only loose consensus at the level of L^P), while other output commitments expressed by the law were derived at subordinate legislative levels (namely $DESC^{always}$ "cloning is always reproductive" at the level of L^{always}, and $DESC^{term}$ "cloning is reproductive only if the intent of the cloner is to bring the clone to term" at the level of L^{term}).

[309] In practice, a *set* of potential laws would be desirable, since it would allow the legislators to select a single law from that set and adopt it in light of their interests and other contingent characteristics.

Given that the purpose of the recursive function is to output a *multi-level law* binding the entire population P, as opposed to separate single-level laws generated at each legislative level and binding only the respective subsets of the population, the output of the recursive function `legislate` at legislative levels *lower* than the top-most level L^P cannot properly be interpreted as a law. Instead, the output of `legislate` at lower legislative levels can be thought of as *contributions* to the multi-level law outputted at the top-most legislative level. We are not interested in laws that might be generated by any given subordinate legislature (say, particularistic laws that have nothing to do with the subsets of the population not represented by that legislature) – we are interested only in the laws that apply to the entire population and that are generated by the entire multi-level legislative system working in concert. When executed at lower legislative levels, the return value outputted by `legislate` must still be of the same *type* as a law, however, namely a set of pairs containing a legislature and the set of output commitments endorsed by that legislature:

$\{ \langle L^1, \Sigma OUT^1 \rangle, \langle L^2, \Sigma OUT^2 \rangle, \ldots, \langle L^n, \Sigma OUT^n \rangle \}$

Output of this type can be returned by a given instance of the recursive function to the instance that called it. Or in other words: the output commitments endorsed by a lower-level legislature can be packaged in this form and sent back up to the higher-level legislature as its contribution to the further specification of the law.

6.5.2 The parameters of the recursive function

What parameters[310] does the function `legislate` take? One might be tempted to pass the set of *input commitments* to `legislate`, but this would be doing some of the function's work for it: the function itself (i.e., the legislature executing the function) must decide which popular commitments are admissible as input commitments to the legislative process under the justificatory constraint of law as pluralism and which are not. The function `legislate` thus takes as a parameter the entire set of *popular* commitments ΣPOP held by the members of the subset of the population *in the legislative jurisdiction for which the function is called*. Where `legislate` is executed in the top-most legislative jurisdiction, this will be the set of popular commitments held by the members of the entire population. So far, then, the function `legislate` looks like this:

```
legislate (…, ΣPOP, …) {

    …

    return LAW
}
```

[310] For the sake of simplicity (and to avoid confusion with the "arguments" used in legislative negotiations), both *formal parameters* (which make up part of the function definition) and *actual parameters* or *arguments* (the values passed to the function) will be referred to as "parameters" here.

Another parameter taken by `legislate` becomes apparent when looking back at the reproductive cloning example in subsection 6.3.2 on "Partially enforceable laws." In order to decide which output commitments to endorse, each legislature must know *which output commitments have already been endorsed at the legislative levels above it*, i.e., at the level of the legislature making the recursive call and above. In the reproductive cloning example, the legislature L^{always} needs to endorse only the output commitment $DESC^{always}$ because L^{P} has already endorsed OUT^{P}_{1} and OUT^{P}_{2}. So now the header of `legislate` looks like this:

```
legislate (…, ΣPOP, ΣOUT)
```

where ΣOUT is the set of output commitments already endorsed at higher legislative levels. When `legislate` is called the first time, i.e., when the top-level legislature is invoked, the set of output commitments ΣOUT will be empty, i.e., { }.

It is clear what the recursive function `legislate` recurs over: the various legislative levels. So the final parameter passed to `legislate` must specify the legislative jurisdiction in which the function is to be executed, i.e., the legislative jurisdiction called upon to generate output commitments that will contribute to the further specification of the law. By way of this parameter, the recursive function `legislate` keeps track of which legislature it is currently dealing with. The simplest solution would be to directly pass the invoked legislature L to the function:

```
legislate (L, ΣPOP, ΣOUT)
```

However, each instance of the recursive function must also know what legislative jurisdictions are *subordinate* to the current legislature. In other words: every legislature must know which lower-level legislatures to invoke next once it has completed its own task of determining adequate output commitments. A straightforward way of doing this would be to provide each instance of the function with the entire structure of the legislative system, i.e., with information on what the entire hierarchy of the legislative levels is. In its simplest form, the structure of the legislative system can be represented by an (upside-down) *tree* consisting of hierarchically linked *nodes*: e.g., in a classic federal system such as Switzerland, the top-most node (or *root node*) of the multi-level legislative structure is the Federal Parliament; the second level of nodes (i.e., the *child nodes* of the root node) consists of the legislatures of the cantonal parliaments; and the third level of nodes (i.e., the child nodes of the child nodes) consists of municipal assemblies, city parliaments, and the like.[311]

[311] In the United States, the top-most node would be the United States Congress, the second level of nodes would be the legislatures of the fifty states (and of territories such as Puerto Rico), and the third level would roughly correspond to the county, municipal, and tribal lawmaking bodies and the like. The U.S. legislative tree is in fact a bit more complicated than this, however, since municipalities and counties may be arranged hierarchically, not coordinately, while certain competences of tribal governments and states may be coordinate, not hierarchical. The U.S. legislative system is thus more precisely rendered as a *directed acyclic graph* – which is the more general data structure than the *tree*. The relationship between the European Union, the member states of the European Union, and the international organizations to which they belong is also more accurately represented as a directed acyclic graph than as a tree. A more precise definition of the recursive function `legislate` would

If we were to include a supranational organization such as the United Nations, then this would be the root node, and national legislatures such as the Swiss Federal Parliament would be in the second level of nodes, along with other national legislatures.

For any given legislature, however, it is irrelevant what the structure of the tree looks like *above* that legislature, or what the tree looks like in coordinate branches: it is only relevant what output commitments have already been endorsed in the direct line above that legislature – and those output commitments are already being passed in as a separate parameter. So each legislature need only know what the structure of the system looks like *from that legislature on down*; it therefore suffices to pass the subtree LS rooted at the node representing the invoked legislature L as a parameter, or in other words: the root node representing the current legislature with the subordinate legislatures attached to that root node as child nodes. Since that subtree already tells the function which legislature is being invoked by the call (namely, the legislature L represented by the root node of the subtree LS), it suffices to pass the subtree LS as a parameter instead of the subtree *and* the legislature L. LS thus represents the entire legislative structure from the current legislature on down.

This completes the skeleton of the recursive function `legislate`:

```
legislate (LS, ΣPOP, ΣOUT) {

    …

    return LAW
}
```

where LAW is a set of pairs of legislatures and the output commitments they endorse (and in the case of the top-most instance of the function, the adequate and enforceable law itself), LS is the subtree rooted at the legislature L invoked by the function call, ΣPOP is the set of popular commitments held by the members of the population subject to L, and ΣOUT is the set of output commitments already endorsed at the legislative levels above L.[312]

By executing `legislate` at the top-most level, the desired law is generated:

```
LAW = legislate (LS^P, ΣPOP^P, {})
```

where LAW is the adequate and enforceable multi-level law, LS^P is the full tree representing the entire legislative structure rooted at L^P, and ΣPOP^P is the

thus take a directed acyclic graph (consisting of *vertices*) as a parameter instead of a tree (consisting of nodes); but for the simplified purposes of this discussion, a tree shall suffice.

[312] One additional parameter will be necessary later on: the set of *laws* already endorsed in previous legislative processes. This parameter serves as *input* to legislative negotiations in the same way that popular commitments admissible as input commitments do; see the discussion at the end of subsection 5.2.1 above. But since this set of laws applies to the *entire* legislative system, it is convenient to consider it a *global* parameter ΣLAW, which is available to all the functions that make up law as pluralism.

set of popular commitments held by members of the entire population P. The third parameter is an empty set, since no output commitments have been generated so far.

Now that we know what the return value of `legislate` is and what parameters it takes, we can begin fleshing out the body of the function.

6.6 Defining the recursive function

6.6.1 Generating output commitments in a given legislature

Two preliminary clarifications are in order: first, the function `legislate` assumes that all the popular commitments are known *in advance*, i.e., before legislative negotiations actually begin. In practice, this will not always be the case: legislators may attempt to introduce *new* popular commitments as input commitments even after legislative negotiations are underway. The definition of `legislate` could be expanded to take account of this, but it would unduly complicate things. Note, however, that the *possible outcomes* of the negotiations are the same whether popular commitments are introduced at the outset or whether they are introduced during negotiations: it is simply a matter of skill and strategy as to when they are introduced.

Second, note that legislators must already put their skills to use even *before* the function `legislate` is called for the first time: namely when deciding *which* popular commitments to put forward as potential input commitments, and when deciding whether to introduce prescriptive commitments *as prescriptive commitments* or whether to *decompose* them first into descriptive commitments and linking commitments. As defined below, the function `legislate` assumes that this process has already taken place, and that the set of popular commitments passed as a parameter to `legislate` is both complete and has already been skillfully selected and structured by the individual legislators.

Given that this set of *popular* commitments is inputted to the recursive function `legislate`, the first task of `legislate` is to weed out the popular commitments that cannot serve as input commitments from those that can.

With the justificatory constraint of law as pluralism, this is a straightforward task: if a popular commitment is descriptive, it is admitted as an input commitment; if a popular commitment is prescriptive, it is admitted only if it is compatible with the other prescriptive popular commitments. This can be defined using a simple helper function `get_ΣINP`, which generates the set of input commitments from the set of popular commitments proposed as input commitments:

```
get_ΣINP (ΣPOP) {

    ΣINP = {}

       for all POP ∈ ΣPOP {

        if ((not is_prescriptive (POP)) or
            is_uncontroversial (POP, ΣPOP))

            ΣINP = ΣINP + POP

    }

    return ΣINP
}
```

The helper function `is_uncontroversial (POP, ΣPOP)`, which checks whether POP is compatible with all the prescriptive members of ΣPOP and is hence uncontroversial, can be defined as follows:

```
is_uncontroversial (POP, ΣPOP) {

    for all POP' ∈ ΣPOP {

       if (is_prescriptive (POP') and (POP / POP')) return FALSE

    }

    return TRUE
}
```

The functions `is_prescriptive` and / are considered primitive, i.e., it is assumed that legislators can agree on their return values without major controversy, given how prescriptive commitments and incompatibility have been defined in sections 3.3 and 3.1 above.[313]

The function `legislate` can now work with an admissible set of input commitments. Now the meaty part of the legislative negotiations at a given legislative level begins: the legislators must use their negotiation skills to propose output commitments that the legislature might endorse, in accordance with the principles set out in chapter 5 on "Decomposing and synthesizing commitments." The set of proposed output commitments is a set of *intermediate commitments*: the legislature holds them all simultaneously, without yet having endorsed any of them. For the purposes of law as pluralism, the function that generates these intermediate commitments from the input commitments is an undefined *black box*: all that matters is the input and the output, while the precise workings are up to the skills of the legislators. While law as pluralism constrains certain aspects of the legislative process and hence treats the legislative process as an *algorithm*, this black box is where legislators are free to act within those constraints in whatever

[313] If controversy does in fact arise, it can be eliminated by the rules "when in doubt, a commitment is prescriptive" and "when in doubt, two prescriptive commitments are incompatible with each other" – at the cost of reducing the set of admissible input commitments at a given legislative level.

algorithmic or non-algorithmic matter they choose. Since this is where negotiation proper (as constrained by law as pluralism) takes place, the function will be referred to as `negotiate`. It takes the set of input commitments as input and generates a set of intermediate commitments:

```
negotiate (ΣINP) {

    //this is where the real meat of the negotiation happens

    return ΣINT
}
```

The legislature can endorse the intermediate commitments thus generated only if they are *adequate*, i.e., if they reflect the set of input commitments. The following helper function `get_ΣOUT'` generates the set of endorsable output commitments given a set of intermediate commitments (which represent proposed output commitments) and the set of input commitments:

```
get_ΣOUT' (ΣINT, ΣINP) {

    ΣOUT' = {}

    for all INT ∈ ΣINT {

        if (is_adequate (INT, ΣINP)) ΣOUT' = ΣOUT' + INT

    }

    return ΣOUT'
}
```

The helper function `is_adequate` implements the simple check for adequacy described above in subsection 5.4.5 on "Checking output commitments for adequacy." While the function does not check whether the proposed output commitment has in fact been *derived* from the entire set of relevant input commitments (a fact that depends on the legislators' skill in making arguments and proposing output commitments), the function does check whether the proposed output commitment is *compatible* with all the input commitments, a necessary but not sufficient condition for derivability. The definition of `is_adequate`, which takes a proposed output commitment and the set of input commitments as parameters, is similar to that of `is_uncontroversial` – which, in light of the definition of adequacy, should not come as a surprise:

```
is_adequate (INT, ΣINP) {

    for all INP ∈ ΣINP {

       if (INT / INP) return FALSE

    }

    return TRUE
}
```

Note that the function `get_ΣOUT'` generates the set of output commitments that the legislature *may* endorse; but *which* elements of the set are *actually* endorsed depends on which output commitments the legislature ultimately *decides* to endorse.[314] For the sake of simplicity, the following discussion will assume that all endorsable output commitments are actually endorsed – this is analogous to the simplification made above regarding the assumption of a *single* law instead of a *set of possible* laws.

These helper functions give `legislate` all the tools it needs to generate its output commitments in a given legislative jurisdiction:

```
legislate (LS, ΣPOP, ΣOUT) {

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    …
}
```

This implements the legislative process in a given legislative jurisdiction as defined in subsection 5.2.1 above:[315]

H (P, ΣPOP) & E (L, ΣOUT) ➢ H (L, ΣINP) ➢ H (L, ΣINT) ➢ E (L, ΣOUT').

6.6.2 Making the recursive call

The function `legislate` is now ready to make the recursive call to itself; it has done everything it can at this level (other than returning its output, which will only be possible once the recursive call has been made).

In order to make the recursive call to itself, `legislate` must determine *which* subordinate legislatures to invoke. Given that the subtree *rooted at the current*

[314] Note that, as we have defined law as pluralism, it does not matter what modality the legislature uses to choose from among possible output commitments, since every one of them is adequate to the set of input commitments – which is all that law as pluralism requires. The actual endorsement of an adequate output commitment will likely depend on other factors, especially contingent characteristics.

[315] Omitting, so far, the output commitments generated in previous legislative processes; see n. 312 on p. 144 above.

legislature, which represents the legislative structure from the current legislature on down, has been passed to `legislate` as a parameter, this task is straightforward: `legislate` must make a recursive call to each legislature that is *child node* (i.e., a directly subordinate legislature) of the *root node* (i.e., the current legislature) passed as a parameter to the current instance of `legislate`:

```
legislate (LS, ΣPOP, ΣOUT) {

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    for all LS' = child node of LS {

        … = legislate (LS',…, …)

    }

    …
}
```

What about the further parameters that `legislate` must pass to the next instances of itself? The second parameter, i.e., the set of relevant popular commitments, is also relatively straightforward: it is simply the set of popular commitments held by the subset of the population that is subject to the legislature represented by the root node of LS'. Determining that subset of popular commitments is as trivial (or not) as determining the initial set of popular commitments for the entire population. Hence the helper function `get_ΣPOP'` – which takes the legislature LS' (or more precisely, the subtree rooted at that legislature) and the entire set of popular commitments passed into the current instance of the function `legislate` as its parameters, and which generates the relevant subset of popular commitments as its output – is primitive, in the sense that it depends on the skills of the legislators offering popular commitments as input commitments:

```
get_ΣPOP' (LS', ΣPOP) {

    …

    return ΣPOP'
}
```

This gives us:

```
legislate (LS, ΣPOP, ΣOUT) {

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    for all LS' = child node of LS {

        … = legislate (LS', get_ΣPOP' (LS', ΣPOP), …)

    }

    …
}
```

Finally, the third parameter: namely the set of output commitments already endorsed. Given the simplification assumed above, ΣOUT' is the set of output commitments actually endorsed by the current legislature. And ΣOUT, which was passed as a parameter to the current legislature, is the set of output commitments already endorsed *prior* to the current instance of the function, by the legislatures in the direct line above the current legislature. Hence ΣOUT ∪ ΣOUT', or the *union* of those two sets, is the entire set of output commitments endorsed so far. Note that it doesn't matter whether some of the commitments contained in ΣOUT' are identical to the commitments contained in ΣOUT: within the union of ΣOUT' and ΣOUT, each commitment is unique. The parameter passed to the next instance of legislate is thus ΣOUT ∪ ΣOUT':

```
legislate (LS, ΣPOP, ΣOUT) {

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    for all LS' = child node of LS {

        … = legislate (LS', get_ΣPOP' (LS', ΣPOP), ΣOUT ∪ ΣOUT')

    }

    …
}
```

So far, we have failed to specify the *return value* of `legislate`. We know it must be a set of pairs of legislatures and the output commitments they endorse, but how can we derive that return value from the information we have generated so far?

Representing the output commitments of the *current* instance of the recursive function is easy, namely ⟨LS, ΣOUT'⟩. What about the output commitments of the *other* legislatures?

Bear in mind that any instance of the recursive function `legislate` only returns the set of pairs of legislatures *from the current legislature on down* and the output commitments endorsed by those legislatures. But the set of pairs of legislatures *below the current legislature* and the output commitments endorsed by those legislatures is simply the union of the sets returned by the recursive calls. The union of *that* set and {⟨LS, ΣOUT'⟩} thus represents *all* the legislatures from the current legislature on down and the output commitments endorsed by those legislatures – and is thus returned by the recursive function:

```
legislate (LS, ΣPOP, ΣOUT) {

    LAW = {}

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    for all LS' = child node of LS {

        LAW = LAW ∪ legislate(LS', get_ΣPOP'(LS',ΣPOP), ΣOUT ∪ ΣOUT')

    }

    return {⟨LS, ΣOUT'⟩} ∪ LAW
}
```

6.7 Termination conditions

6.7.1 Reaching tight consensus before the structure is exhausted

The recursive function `legislate` is now almost complete, but an important point has been omitted so far: the *termination conditions* of the recursive function. As it has been defined so far, the recursive function *never* terminates – or rather, it terminates only once it has run out of legislatures (i.e., child nodes) to invoke, i.e., once the tree representing the entire multi-level legislative structure has been exhausted.[316]

This may, in fact, be sufficient as a termination condition under the following circumstances: if the only laws that enjoy tight consensus are those including output commitments endorsed at the *lowest* legislative levels. If tight consensus cannot be achieved at any level higher than the lowest legislative levels, no sufficiently specified and enforceable laws can be generated by terminating the recursion before it hits the bottom of the tree representing the legislative structure. This may be the case in a population that shares only very few fundamental commitments, and agreement on such fundamental commitments can be reached only within very particularistic subsets of the population subject to the lowest level of legislatures.

[316] In the function `legislate`, if LS has no child nodes, the for-loop is simply not executed, and the function terminates by returning its contribution to the law.

Where tight consensus can be achieved at levels higher than the lowest levels, however, there is no need for the recursion to continue all the way down. Some laws may be relatively uncontroversial, i.e., agreement on the relevant output commitments can be reached at relatively high levels, and perhaps only minor details need to be further specified at lower levels, if at all; or the structure of the population is such that it divides into only a few subsets with regard to the fundamental commitments at issue (e.g., pro-choice/pro-life, pro-death-penalty/anti-death-penalty, pro-TCM/anti-TCM, and so on). Continuing the recursion downward beyond levels where tight consensus can be reached is not only unnecessary – it also wastes legislative resources. Once tight consensus is achieved – at any level – the law outputted by the top-most call to the recursive function `legislate` is sufficiently specified to be enforceable.

Hence, the recursive function can be terminated at the level of any given legislature, if the output commitments of that legislature enjoy tight consensus. Where this is the case, there is no reason to make a recursive call to `legislate` and invoke the next lower legislatures represented by the child nodes.

How does a legislature determine that tight consensus has been achieved? As mentioned above, tight consensus is achieved when all the output commitments generated so far *mean the same thing* to every legislator in that legislature, at least with respect to the committive and permissive inferences of that output commitment.[317] *Meaning the same thing* can be defined conveniently in terms of the inferential role the output commitments play for each of the legislators, i.e., the relevant conclusions each legislator may draw from the output commitments. As we have seen, for any legislator X, any legislator Y, and any (relevant) commitment C:

(H (X, OUT) ➢ H (X, C)) → (H (Y, OUT) ➢ H (Y, C)).

If all of the relevant commitments held by X and Y were known, this relationship could be tested algorithmically. In practice, however, any legislator is entitled to a great many relevant commitments without necessarily being aware of them or even interested in what they might be. There is no simple way for a legislator to make the commitments explicit that he or she is entitled to, given the legislator's commitment to the output commitment.[318] Moreover, which further commitments the legislator is entitled to in light of a given output commitment generally only becomes apparent as the law plays out over time: once it becomes apparent how the law functions in the real world and what it thereby *implies*, by either committive inference or permissive inference, will a legislator be able to say with certainty whether the law actually means what the legislator thought it meant.

A skillful legislator engaged in legislative negotiations, however, will be able to ascertain more or less accurately whether her understanding of the output

[317] See the discussion in subsection 6.2.2 above on "What it means for a commitment to mean the same thing."
[318] Or, more precisely, given the legislator's commitment to the (probably subsidiary) popular commitment with the same content as the output commitment.

commitments expressed by a law corresponds to the understanding of those commitments by her legislative colleagues. If the expression of an output commitment includes the term "human life," the legislators can be expected to know whether they all agree on the relevant meaning of that term or not. In other words, skillful legislators will know whether the concepts included in the legislature's output commitments are *essentially contested* or not.

Recall what happens if tight consensus is not reached in a given legislature: the function `legislate` is then called recursively, and the next-lower legislatures are invoked. In practice, a *decision* must be made whether consideration of a legislative proposal can terminate at a given level, i.e., whether tight consensus has already been reached, or whether consideration of the legislative proposal should be passed downward to the next level of legislatures. Who or what makes that *decision* is determined by the institutional competence of the actors in the legislative system in question: the decision may be made by the legislature currently considering the proposal (i.e., the legislature may *delegate* further specification of the law to lower levels), or it may be made by the legislatures below the current level (i.e., the subordinate legislatures may *assert the right* to further specify the law).[319] Conceivably, some other political actor (e.g., the executive or judicial branch) may decide that the law must be further specified at a lower legislative level.

Regardless of who or what makes the decision as to whether the output commitments generated by a given legislature enjoy tight consensus: once tight consensus has been achieved at a given level with respect to the output commitments expressed by a law, the law has been sufficiently specified to be enforceable and no further recursive calls are necessary. This decision to terminate the recursion can be specified using the following primitive helper function, which takes the set of output commitments generated by a given legislature as its parameter and returns TRUE or FALSE:

```
is_tight (ΣOUT') {

    …

    return TRUE or return FALSE
}
```

Including this termination condition in the recursive function `legislate` gives us the following definition of the function:

[319] This difference mirrors the difference in emphasis between the *Solange II* judgment and the *Solange I* judgment with respect to the jurisdiction of the European Court of Justice and the Federal Constitutional Court of Germany.

```
legislate (LS, ΣPOP, ΣOUT) {

    LAW = {}

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    if (not is_tight (ΣOUT ∪ ΣOUT')) {

        for all LS' = child node of LS {

            LAW=LAW ∪ legislate(LS',get_ΣPOP'(LS',ΣPOP),ΣOUT ∪ ΣOUT')

        }

    }

    return {⟨LS, ΣOUT'⟩} ∪ LAW
}
```

The recursive function `legislate` will thus terminate once it has run out of legislatures to invoke or once tight consensus on the output commitments has been achieved in a given legislature.

As the function recurs upward again, the law which previously only enjoyed *loose* consensus now enjoys *tight* consensus, thanks to the contributions by the lower-level legislatures to further specification of the law, and hence it is enforceable. The law outputted by the top-level recursive call to `legislate` is thus both *adequate* to the popular commitments held by the entire population and *enforceable* – i.e., it meets the conditions set out in the normative goal of this paper.

6.7.2 Libertarian and (de)centralized communitarian variants

One final scenario must be considered before the recursive function `legislate` can be considered complete. It was hinted at above: what if the function recurs over *all* legislative levels, i.e., every legislature has had the opportunity to contribute to the further specification of the law, yet the law *still* does not enjoy tight consensus? This may happen if the disagreement regarding fundamental commitments is still so great even at the lowest legislative levels that no tight consensus can be reached. If this is the case, then the legislative structure is unable to generate a (relevant) law that is both *adequate* and *enforceable*.

A straightforward implementation of law as pluralism would happily fail to specify the law: there simply would be *no* enforceable law adequate to the full set of popular commitments, hence no sufficiently specified law should be generated to guide the human conduct under consideration – in other words: a legislative output would be generated, but it would enjoy only loose consensus, and thus would state a general, unenforceable *principle* relevant to the human conduct in question without constituting a specific, enforceable *norm*. In practice, this would mean that the conduct in question would be

unregulated and hence left to the discretion of the individual members of the population – this might be called the *libertarian* variant of the recursive function `legislate`. This libertarian variant of `legislate` is the variant defined above:

```
// libertarian variant
legislate (LS, ΣPOP, ΣOUT) {

    LAW = {}

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    if (not is_tight (ΣOUT ∪ ΣOUT')) {

        for all LS' = child node of LS {

            LAW=LAW ∪ legislate(LS',get_ΣPOP'(LS',ΣPOP),ΣOUT ∪ ΣOUT')

        }

    }

    return {⟨LS, ΣOUT'⟩} ∪ LAW
}
```

There are, however, other options. These alternate implementations of law as pluralism involve privileging *enforceability* over *adequacy* and hence look more like the traditional legislative process that is less concerned with the adequacy of laws to the full range of fundamental commitments held by the population bound by them. Compared with the libertarian implementation of law as pluralism, these implementations are thus more *communitarian* in the sense that the community (as represented by the legislatures making up the legislative structure) has more to say about what qualifies as acceptable human conduct than under the libertarian variant. The basic idea of the communitarian variants is that if tight consensus cannot be achieved even after invoking all of the legislatures in the entire legislative structure, then *some* legislature has to make a decision as to what output commitments to endorse, even if those output commitments are not adequate to the popular commitments of the relevant subset of the question. How that decision is made is determined by the rules governing the individual legislatures and the legislative system as a whole: for instance, where tight consensus is not achievable, the system might specify that the top-most legislature decide by a majority or supermajority vote which output commitments to endorse (a more centralized option); or it might specify that the bottom-most legislatures decide by a majority or supermajority vote which output commitments to endorse (a more decentralized option). The decentralized option privileges the fundamental commitments held by the respective majorities (or supermajorities) of the *smallest subsets* of the population represented by a legislature, while the centralized option privileges the fundamental commitments held by a majority (or supermajority) of the *entire* population.

Note that under the centralized option, the law is then no longer generated by recursion: the only role of the recursive function is to check whether tight

consensus can be achieved, and if so, to generate the law enjoying such tight consensus. Where tight consensus is not achievable, the law is simply outputted non-recursively by the top-most legislature.

In this sense, the decentralized option comes closer to the spirit of the libertarian implementation of law as pluralism, as it achieves adequacy *to the extent achievable*, using the device of recursive pluralism. The decentralized communitarian option thus occupies the middle ground between the libertarian variant of law as pluralism, which emphasizes *adequacy* over *enforceability*, and the centralized communitarian variant of law as pluralism, which sacrifices adequacy in the interest of (centralized) enforceability. In the following, the decentralized variant will be used, but it should be borne it mind that alternate implementations, such as the libertarian variant or the centralized variant, are also feasible.

The decentralized variant of `legislate` can be derived from the libertarian variant by specifying an additional termination condition: if a legislature at the lowest level of the legislative structure is reached and the set of output commitments generated by that legislature does not enjoy tight consensus, then a vote is taken (implemented by the primitive helper function `vote`) to decide which of the intermediate commitments (i.e., the proposed output commitments) to endorse as output commitments:

```
// decentralized variant
legislate (LS, ΣPOP, ΣOUT) {

    LAW = {}

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    if (not is_tight (ΣOUT ∪ ΣOUT')) {

        if (∃ child node of LS) for all LS' = child node of LS {

            LAW=LAW ∪ legislate(LS',get_ΣPOP'(LS',ΣPOP),ΣOUT ∪ ΣOUT')

        } else ΣOUT' = vote (ΣINT)

    }

    return {⟨LS, ΣOUT'⟩} ∪ LAW
}
```

6.7.3 Failure to achieve enforceability in practice

Finally, one last criterion should be built into the recursive function `legislate`: as currently defined, the function `legislate` may generate laws that, in light of the tight consensus they enjoy, are enforceable *in theory*, but are not enforceable *in practice*. Even though a law is sufficiently specified and hence enforceable in theory, it may not be enforceable in practice due to the unavailability of enforcement mechanisms, the involvement of too many competing enforcement mechanisms, the exorbitant cost of enforcement, or

the sheer complexity of the law. Where a law threatens to become unenforceable on such practical grounds, the legislative process must be cut short and a decision taken to adopt a law even though recursive pluralism has not been given the opportunity to run its full course. While this may ensure the enforceability of the resulting law, the law may no longer be fully adequate to the popular commitments of the population it binds. The criterion of *practical enforceability* is thus a step away from the *prima facie* equal treatment of all relevant fundamental commitments in favor of equal treatment *to the extent achievable*.

There are several ways to implement the criterion of practical enforceability, but – analogously to the decentralized variant of `legislate` – it does least damage to the principle of recursive pluralism if the decision to cut off the recursion prematurely is taken (paradigmatically by a vote) at the lowest possible level. The simplest way to do this is the following: if, before returning from a given instance of the recursive function, the output commitments generated so far (by the current legislature as well as by the legislatures in a direct line both above and below the current legislature) would, *in the judgment of the current legislature,* be enforceable *as a practical matter* when expressed as a law, then the output returned by the current instance of the function will be the same as before. If not, however, then the current legislature takes a vote on what contribution it decides to make to the emerging law, in light of the need for the resulting law to be practically enforceable.

This entails the following modification of the recursive function `legislate`:

```
legislate (LS, ΣPOP, ΣOUT) {

    LAW = {}

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    if (not is_tight (ΣOUT ∪ ΣOUT')) {

        if (∃ child node of LS) for all LS' = child node of LS {

            LAW=LAW ∪ legislate(LS',get_ΣPOP'(LS',ΣPOP),ΣOUT ∪ ΣOUT')

        } else ΣOUT' = vote (ΣINT)

    }

    if (is_enforceable ({⟨LS, ΣOUT ∪ ΣOUT'⟩} ∪ LAW)) {

        return {⟨LS, ΣOUT'⟩} ∪ LAW

    } else {

        return {⟨LS, vote (ΣINT)⟩}

    }
}
```

The function `is_enforceable` is primitive, i.e., the legislators in the current legislature must skillfully (and most likely non-algorithmically) decide whether the law resulting inter alia from the recursive calls to the lower legislative levels is enforceable as a practical matter or not. The function `is_enforceable` takes only one parameter: the preliminary law constructed from the output commitments contributed by all the legislatures in a direct line above the current legislature, the current node itself, and the legislatures in direct lines below the current legislature. While this preliminary law does not include the contributions made by the legislatures *not* in direct lines above or below the current legislature, it represents the components of the law *that would be enforced in the current legislative jurisdiction* if the law were in fact adopted – the output commitments generated by legislatures not in a direct line with the current legislature are irrelevant to the current legislative jurisdiction, since they do not concern the subset of the population subject to the current legislature.

Note that the parameter passed to `is_enforceable` counterfactually assumes that the output commitments of the legislatures above the current legislature are all attributed to the *current* legislature, rather than to the respective legislatures above the current legislature. This makes no difference in practice: given the way the recursive function `legislate` is designed, all of the output commitments generated by legislatures above the current legislature apply both to the legislative jurisdictions above the current legislature *as well as* to the current legislative jurisdiction. The preliminary law passed to `is_enforceable` can thus be assessed for its practical enforceability. If it is deemed enforceable in practice, the relevant components are returned back up to the next-higher instance of the recursive function; if not, the current legislature takes a vote and decides which contribution to make to the law so that it is enforceable in practice.

This completes the definition of `legislate`; the next section will examine the top-level function that makes the initial call to the recursive function.

6.8 Executing the recursive function

When called at the top-most level, i.e., when executed by the top-most legislature, the recursive function `legislate` (in any of its libertarian or communitarian variants) implements recursive pluralism. Any law outputted by that top-level call is *adequate* to the fundamental commitments of the entire population (at least to the extent achievable) and is *enforceable* (at least if a variant of `legislate` is chosen that makes a decision on an enforceable law when tight consensus cannot be achieved). Given a constellation of interests and other contingent characteristics, a legislature is free to choose (say, by a vote or any other decision mechanism) which laws outputted by `legislate` to actually adopt – any of them meet the requirements of law as pluralism. Which of the laws outputted by `legislate` are actually adopted is irrelevant to law as pluralism, since they are all enforceable and equally adequate.

Of course, lawmaking consists of a potentially *infinite* number of legislative processes dealing with particular issues relevant to human conduct: the recursive function `legislate` must therefore be called again and again, depending on the legislative project at issue. Each time `legislate` is executed at the top-most level, it is passed the structure of the entire legislative system and the popular commitments relevant to the issue under consideration.

What the function `legislate` has neglected so far is the set of laws already endorsed by the legislative system in previous legislative processes. This set is the same for any given instance of the recursive function within a given legislative process: it is only updated once the recursive function has run its entire course and a new law is actually adopted. In this sense, the set of laws is *global* to the entire legislative structure and to all of the functions called therein. Hence it can be represented as a *global* variable ΣLAW that need not be passed to the individual functions as a parameter.[320] This set of laws ΣLAW already adopted can be used by any of the functions, most notably `negotiate`, to derive the set of output commitments and hence the new laws. The availability of ΣLAW to the legislative process implements the fact that any (non-revolutionary) legislature always builds on the existing legislation already in force.

The potentially infinite iteration of legislative processes under law as pluralism can be represented by the following top-level function `law_as_pluralism`, the main purpose of which is to make the top-level call to `legislate` and to update the set of laws according to the output of `legislate`:

```
global ΣLAW = {}

law_as_pluralism (LS^P, ΣPOP^P) {

    while humanity_exists {

       LAW = legislate (LS^P, ΣPOP^P, {})

       ΣLAW = purge_ΣLAW (LAW, ΣLAW)

       ΣLAW = ΣLAW ∪ LAW

   }

}
```

The parameters passed to `law_as_pluralism` are the legislative structure LS^P rooted at the top-level legislature and the entire set of popular commitments held by the population ΣPOP^P. [321] The global variable ΣLAW is

[320] Apologies to those modular and object-oriented computer scientists aghast at the notion of a global variable.

[321] Strictly speaking, ΣPOP^P is a *dynamic variable*, since its value may change at any time during the execution of `law_as_pluralism`. Any such changes are *external* to `law_as_pluralism`, however: they are not brought about by the legislative process, but

initially defined as empty, assuming there are no pre-existing laws endorsed by the legislative system. The flag `humanity_exists` is assumed to be primitive.[322] Within the (potentially) infinite while-loop, repeated calls to `legislate` at the top-most level are made, with the entire legislative structure and the entire set of popular commitments as input. In each iteration of the while-loop, the set of laws is updated to include the new laws outputted by the recursive function `legislate`.

The line

```
ΣLAW = purge_ΣLAW (LAW, ΣLAW)
```

is not strictly necessary under law as pluralism, but it is desirable, and it will be relevant to the discussion of *integrity* in section 7.1 on "Making justifications explicit" below: it ensures the consistency of the set of laws by implementing the principle of *lex posterior derogat priori*, i.e., any old laws contained in ΣLAW inconsistent with the new law LAW are deemed void (or repealed). This line will be invoked especially if the set of popular commitments changes over time, or simply if alternate laws are chosen from the set of potentially endorsable laws that conflict with those previously chosen.

Implementation of `purge_ΣLAW` is as straightforward as checking for the incompatibility of laws:

```
purge_ΣLAW (LAW, ΣLAW) {

    ΣLAW' = ΣLAW

    for all LAW' ∈ ΣLAW' {

        if (LAW / LAW') ΣLAW' = ΣLAW' - LAW'

    }

    return ΣLAW'
}
```

The function `law_as_pluralism` implements law as pluralism given a fixed legislative structure, generating a consistent set of enforceable laws that are adequate (to the extent achievable) to the (potentially changing) set of popular commitments held by the population. The following section examines how this function must be modified to take account of *variable* legislative structures.

---

rather by other social forces operating in the public sphere as well as individual autonomous decisions made in private.

[322] Although in the real world, it at least partially depends on ΣLAW.

6.9 The relationship between popular commitments and the legislative structure

So far, we have assumed that both the entire set of popular commitments ΣPOP^P held by the population P and the entire multi-level legislative structure LS^P are *given*, i.e., that neither of them are changed by law as pluralism (although we have noted that ΣPOP^P may change over time due to exogenous factors). We have ignored the ways in which each of these quantities may influence the other.

A basic premise of law as pluralism is that the negotiation of laws is not about the popular commitments that serve as input to the legislative process, but rather about how to bind, in a consistent and enforceable manner, members of a population who hold a particular constellation of conflicting popular commitments.[323] Accordingly, any impact LS^P has on ΣPOP^P must be *incidental*, not *intrinsic* to law as pluralism.

What about the converse? Any legislative structure is historically contingent, i.e., shaped by wars, revolutions, constitutional conventions, executive fiat, royal prerogative, legislative action, judicial review, political and social culture, monied interests, the role of religion in society, expediency, and so on. More generally, the legislative structure is determined by the *popular commitments* of the population it governs (in the case of the world's legislative structure, the world's population) and the *contingent characteristics* that have prioritized certain popular commitments over others and certain particularistic interests over others.

A full implementation of the regulative ideal of law as pluralism would give greater weight to popular commitments than to contingent characteristics when defining the legislative structure: not only the *substantive norms* outputted by the legislative process should be guided by the regulative ideal of law as pluralism, but also the *legislative structure* which implements the legislative process itself should be guided by the regulative ideal of law as pluralism. Ensuring that the legislative structure reflects the set of popular commitments in a population makes it more likely that the laws outputted by that legislative structure enjoy tight consensus.

The discussion in subsection 6.7.2 above regarding the distinction between libertarian and communitarian variants of the recursive function `legislate` indicates why this is so. A *variable legislative structure* offers a more refined solution to the problem of the recursive function `legislate` exhausting the entire legislative structure before tight consensus is reached: if tight consensus is regularly impossible to achieve in a given legislative structure, even when recurring downward to the lowest level of the legislative structure, then – instead of settling the matter with a vote as in the communitarian variant of `legislate` in a fixed legislative structure – the legislative structure itself can be expanded to include further child nodes below the existing lowest level,[324]

[323] See the discussion on p. 58 and in nn. 137 and 138 above.

[324] This is one way to implement self-determination: see the initiative by the Principality of Liechtenstein at the United Nations on *Effective Realization of the Right of Self-Determination through Autonomy* for a general discussion of potential mechanisms for this purpose, and article 4(2) of the *Constitution of the Principality of Liechtenstein* for a concrete implementation

or it can be reorganized to bring previously disparate subsets of the population holding similar fundamental commitments together under the same legislature.[325]

This possibility of a variable legislative structure brings the libertarian and communitarian variants closer together by reducing the need for votes to be taken under conditions of conflicting fundamental commitments: unlike the libertarian variant of `legislate`, but like the communitarian variant, the possibility of a variable legislative structure allows more decisions to be taken by *legislatures* as opposed to *individuals*; but unlike the communitarian variant of `legislate`, and like the libertarian variant, fewer decisions affecting the conduct of human beings would be taken by a *vote*.

What would a function `get_LS` look like that generates a (new) legislative structure, given the set of popular commitments (and the existing legislative structure, where one exists)? The generation of a new legislative structure is what Bruce Ackerman would call a *constitutional moment* or an instance of *higher lawmaking*:[326] the procedure by which the new legislative structure is defined would itself be determined by the popular commitments at the time. So, like `negotiate`, `get_LS` is a *black box* for the purposes of law as pluralism. All that matters is that the output of `get_LS` be *adequate* to the popular commitments serving as input commitments to the higher lawmaking process, in accordance with the principles elaborated in chapters 4 and 5 on "The justificatory constraint of law as pluralism" and "Decomposing and synthesizing commitments" above. The function `get_LS` can thus be represented as follows:

```
get_LS (LS^P, ΣPOP^P) {

    LS^P' = ∅

    //this is where higher lawmaking takes place and LS^P' is defined

    return LS^P'
}
```

Taking the possibility of variable legislative structures into account, the ideal top-level function `law_as_pluralism` would be redefined as follows:

---

of such a mechanism. Taken to its logical conclusion, this makes possible the conditions referred to by Asad 2003, 180: "What kind of conditions can be developed in secular Europe – and beyond – in which *everyone* may live as a minority among minorities?" It also implements the "exit option" referred to in Ely 1980, 178-179, without requiring *physical* relocation of members of the population. Adjusting the legislative structure moves the mountain, not the prophet.

[325] Arguably, this is the process aspired to in the progressive development of the European Union.

[326] See Ackerman 1991, 266-294, and Choudhry 2008.

```
law_as_pluralism (ΣPOP^P) {

    LS^P = ∅

    while humanity_exists {

       LS^P = get_LS (LS^P, ΣPOP^P)

       LAW = legislate (LS^P, ΣPOP^P, {})

       ΣLAW = purge_ΣLAW (LAW, ΣLAW)

       ΣLAW = ΣLAW ∪ LAW

    }
}
```

The top-level function `law_as_pluralism` now only takes the set of popular commitments as its (potentially always changing) parameter: the legislative structure LS^P is now defined *within* the function `law_as_pluralism`, given that it is now dependent on the changing set of popular commitments. LS^P starts out as an empty tree $\varnothing$: this assumes that the first legislative act under law as pluralism comes at a constitutional moment, i.e., the legislative structure must be defined first before ordinary lawmaking can commence. The line

```
LS^P = get_LS (LS^P, ΣPOP^P)
```

is *inside* the while-loop: this means that a constitutional moment is always possible in principle, i.e., the legislative structure may be modified dynamically at any time as popular commitments change. After the first iteration of the while-loop, `get_LS` makes use of the existing legislative structure to generate the new legislative structure; exactly what use is made of it is determined solely by the black box of `get_LS`'s definition, however. In particular, it is the responsibility of `get_LS` to decide whether a proposed modification to the existing legislative structure is feasible in practice, or also whether an entirely new legislative structure should be established.

The possibility of a variable legislative structure raises the question of what all can be considered a *legislature*: so far, we have assumed that a legislature is akin to the standard situation in modern nation states: a more or less representative body with *fixed*, *territorial*, more or less *compulsory*, and generally *non-overlapping* (but hierarchically arranged) legislative jurisdiction. None of these criteria are necessary elements of law as pluralism, however: legislatures under law as pluralism may also have legislative jurisdictions that are *variable*, *non-territorial*, *voluntary*, or *overlapping*. The only criteria for inclusion as a legislature under law as pluralism is that the resulting legislative structure be a tree with a single root node,[327] and that the legislature's output commitments contribute to a law that is *binding* on the

[327] Or more precisely, a directed acyclic graph with a single "root" vertex.

members of the population subject to the legislature, as long as they are in fact subject to the legislature.[328]

This completes the definition of the recursive function `legislate` and the top-level function `law_as_pluralism` – including the possibility of dynamically changing the legislative structure as the set of popular commitments changes – and hence the definition of the algorithmic aspects of law as pluralism. The full definition is included in the Appendix.

Now that law as pluralism has been formally defined as an executable function, the final section in this chapter will test the function using the example of the essentially contested concept of marriage.

6.10 Test case: A recursive definition of marriage

6.10.1 Marriage as an essentially contested concept

Marriage is an essentially contested concept: not only is the contested definition of marriage emotionally charged, it is also rooted in fundamental commitments that concern the most basic aspects of what it means to be human, including sexuality, love and affection, birth and child-raising, property rights, individual freedom versus familial and communal obligations, the meaning of life and death, the threat of eternal damnation, and so on. Few people are indifferent as to the definition of marriage and its significance or lack thereof, and most if not all religions have strong views about what marriage is, how their adherents should approach it, and what kinds of human conduct are appropriate only inside or outside of marriage.

Marriage is therefore destined to be a test case of law as pluralism and the mechanisms used by law as pluralism. The following example illustrates how

[328] Examples might include the millet system in the Ottoman Empire, norms binding upon members of religious groups, norms governing the use of social networks, and so on. See the references in n. 72 on p. 28, especially Rosenfeld 2008, and Krisch 2010. The territorial conception of federalism as manifested in hierarchical legislative arrangements is a particularly European innovation; see Everett 1997, 101: "The traditional Euro-American theories of federalism assumed that it was territorial units that would be represented in broader publics. However, in the Indian situation we see a parallel indigenous 'federalism' of caste, commune, language, and religion. That is, the treatylike voluntary agreements of federalism are challenged by relatively involuntary units bonded together by traditions, genetic makeup, and communal identity." There is even nothing in the definition of law as pluralism that prevents certain nodes from being *eschatological*; see, e.g., Asad 2003, 239, discussing Ahmad Safwat's legal theory: "Where the disregard or breaking of a rule leads to punishment imposed by the state, says Safwat, there is (secular) law; where transgression is sanctioned only be punishment in the next world, there is (religious) morality. The interesting point here is not simply that law and morality are distinguished (medieval Islamic jurists made that distinction too […]), but that the distinction between 'morality' and 'law' can be defined in parallel ways as rules, and that their obligatory character is constituted by the punishment attached to them." What law as pluralism *does* impede, however, is the existence of worldly nodes *subordinate* to such eschatological nodes, at least in terms of the tree representing the legislative structure. But this does not mean that worldly nodes are necessarily superior to eschatological nodes in anything but this restricted sense; cf. Audi 2000, 140: "Agreeing on the principles – and referees – of a game does not entail believing that, from a higher point of view, there can be no better game, or no superior referees."

law as pluralism, and in particular recursive pluralism, might generate laws governing the contested institution of marriage. Note, however, that the actual outcome of such negotiations is not predetermined by the algorithms that define law as pluralism: the content of any actual law will depend on the distribution of popular commitments in the population and the legislatures, the legislative structure, the skill of legislators during the negotiations, and the behavior of legislators if they are called upon to vote.

6.10.2 Identifying the popular commitments

Assume that at time t_0, various members of the population P hold the following prescriptive popular commitments (which are either fundamental or subsidiary, i.e., derived from fundamental commitments) relevant to marriage:

$PRSC_{BENE}$ = "Married persons ought to be entitled to a set of benefits arising from their married status, including in regard to taxation, inheritance, child custody, property, health and pension insurance, visitation rights and legal privilege, welfare benefits, and so on"

$PRSC_{MW}$ = "Only a man and a woman ought to be allowed to marry"

$PRSC_{BISEX}$ = "Any two adults ought to be allowed to marry"

$PRSC_{M4W}$ = "Any one man and up to four women ought to be allowed to marry"

$PRSC_{MP\text{-}AD}$ = "Only married persons ought to be allowed to adopt a child"

$PRSC_{AP\text{-}AD}$ = "Any adult person ought to be allowed to adopt a child"

So far, the set of popular commitments in population P is thus defined as follows:

$\Sigma POP^{P} = \{PRSC_{BENE}, PRSC_{MW}, PRSC_{BISEX}, PRSC_{M4W}, PRSC_{MP\text{-}AD}, PRSC_{AP\text{-}AD}\}$

Assume that only $PRSC_{BENE}$ is held by the entire population P; the other popular commitments are held by various subsets of the population, some of which overlap, some of which do not. The subsets of the population are related as follows:

$P^{MW} \cap P^{BISEX} = \{\}$, $P^{MW} \cap P^{M4W} = \{\}$, $P^{BISEX} \cap P^{M4W} = \{\}$

$P^{MP\text{-}AD} \cap P^{MW} \neq \{\}$, $P^{MP\text{-}AD} \cap P^{BISEX} \neq \{\}$, $P^{MP\text{-}AD} \cap P^{M4W} \neq \{\}$

$P^{AP\text{-}AD} \cap P^{MW} \neq \{\}$, $P^{AP\text{-}AD} \cap P^{BISEX} \neq \{\}$, $P^{AP\text{-}AD} \cap P^{M4W} \neq \{\}$

Finally, assume that the set of relevant laws at time t_0 is empty; society exists in a state of nature, so to speak, with regard to the institution of marriage:

$\Sigma LAW = \{\}$

Before the legislative process under law as pluralism commences, legislators (in the top-level legislature) will skillfully determine which popular commitments to propose for inclusion as input commitments to the legislative process, and whether any popular prescriptive commitments should be decomposed into descriptive commitments and linking commitments in order to be admissible.

Skillful legislators will notice that only $PRSC_{BENE}$ can be included directly as an input commitment. The other prescriptive commitments are controversial at the level of P and hence inadmissible as input commitments to the legislative process in L^P. To be included, the controversial prescriptive commitments must be skillfully decomposed into descriptive commitments and uncontroversial linking commitments, for example as follows:

$PRSC_{MW}$ ➢ $DESC_{MW}$ "Marriage is between a man and a woman" &
$LINK_{MW}$ "Any adult person ought to be allowed to marry"

$PRSC_{BISEX}$ ➢ $DESC_{BISEX}$ "Marriage is between any two adults" &
$LINK_{BISEX}$ "Any adult person ought to be allowed to marry"

$PRSC_{M4W}$ ➢ $DESC_{M4W}$ "Marriage is between a man and up to four women" &
$LINK_{M4W}$ "Any adult person ought to be allowed to marry"

$PRSC_{MP\text{-}AD}$ ➢$DESC_{MP\text{-}AD}$ "Adoption is between married persons and a child" &
$LINK_{MP\text{-}AD}$ "Any adult person ought be allowed to adopt"

$PRSC_{AP\text{-}AD}$ ➢$DESC_{AP\text{-}AD}$ "Adoption is between an adult person and a child" &
$LINK_{AP\text{-}AD}$ "Any adult person ought to be allowed to adopt"

Note that $LINK_{MW} = LINK_{BISEX} = LINK_{M4W}$ and $LINK_{MP\text{-}AD} = LINK_{AP\text{-}AD}$. We can therefore refer to the former simply as $LINK_{MARRY}$ "any adult person ought to be allowed to marry" and the latter as $LINK_{ADOPT}$ "any adult person ought to be allowed to adopt."

The expanded set of popular commitments, including the results of the decompositions, is now:

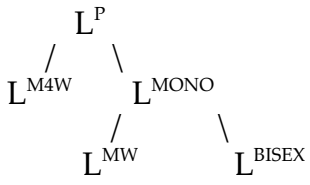
$\Sigma POP^P = \{PRSC_{BENE}, PRSC_{MW}, PRSC_{BISEX}, PRSC_{M4W}, PRSC_{MP\text{-}AD}, PRSC_{AP\text{-}AD},$
$DESC_{MW}, DESC_{BISEX}, DESC_{M4W}, DESC_{MP\text{-}AD}, DESC_{AP\text{-}AD},$
$LINK_{MARRY}, LINK_{ADOPT}\}$

6.10.3 Starting the legislative process at the top-most level

The legislative process can now commence by calling

```
law_as_pluralism (ΣPOP^P)
```

The function begins by initializing the legislature structure LS^P to an empty tree, checking whether humanity still exists, and generating the current legislative structure LS^P in light of the set of popular commitments ΣPOP^P. Given the set of popular commitments and contingent characteristics such as shared histories, shared cultures, dominant religions, the respective social statuses, birth ratios, and life expectancies of men and women, the location of mountain passes and streams, and so on, assume that the function `get_LS` generates an overall legislative structure LS^P that roughly reflects the structure of the population with regard to popular commitments $PRSC_{MW}$, $PRSC_{BISEX}$, and $PRSC_{M4W}$:



This means that the top-level legislature L^P binds the entire population P; the second-level legislatures L^{M4W} and L^{MONO} bind the subsets P^{M4W} and $P^{MW} \cup P^{BISEX}$, respectively; and the third-level legislatures L^{MW} and L^{BISEX} (which are subordinate to L^{MONO}) bind the subsets P^{MW} and P^{BISEX}, respectively.

The law LAW governing marriage can now be generated by calling the recursive function `legislate` with LS^P, ΣPOP^P and the currently empty set of output commitments as parameters:

```
LAW = legislate (LS^P, ΣPOP^P, {})
```

The first instance of `legislate` invokes the top-most legislature L^P (the root node of LS^P). After initializing the law LAW to an empty set, the function `get_ΣINP` generates the set of input commitments, given the set of popular commitments. Only descriptive commitments and uncontroversial prescriptive commitments are admitted as input commitments; this gives us the following set of input commitments:

ΣINP^P = {$PRSC_{BENE}$, $DESC_{MW}$, $DESC_{BISEX}$, $DESC_{M4W}$, $DESC_{MP\text{-}AD}$, $DESC_{AP\text{-}AD}$, $LINK_{MARRY}$, $LINK_{ADOPT}$}

The meaty part of the negotiations now begins: the function `negotiate` generates the proposed output commitments, in the form of a set of intermediate commitments ΣINT^P. The precise set of proposed output commitments will depend on the skills of the legislators; given the input commitments, however, ΣINT^P is likely to include at least the following proposed output commitments, corresponding to the uncontroversial prescriptive input commitments:

INT^P_{BENE} = "Married persons shall be entitled to a set of benefits arising from their married status, including in regard to taxation, inheritance, child custody, property, health and pension insurance, visitation rights and legal privilege, welfare benefits, and so on"

INT^{P}_{MARRY} = "Any adult person shall be allowed to marry"

INT^{P}_{ADOPT} = "Any adult person shall be allowed to adopt"

Since all of these intermediate commitments are adequate to all of the input commitments, the function `get_ΣOUT'` will include the corresponding output commitments in the set of endorsable output commitments, hence:[329]

$\Sigma OUT^{P} = \{OUT^{P}_{BENE}, OUT^{P}_{MARRY}, OUT^{P}_{ADOPT}\}$

6.10.4 Invoking lower-level legislatures

As the function `is_tight` will determine, however, this set of output commitments does not enjoy tight consensus: a law expressing this set of output commitments would not be sufficiently specified, and hence it would not be enforceable – precisely because the concepts of "marriage" and "adoption" are essentially contested at the level of L^{P}. Accordingly, new instances of the recursive function `legislate` are called for each of the child nodes of L^{P}, i.e., L^{M4W} and L^{MONO}. ΣOUT^{P} – the set of output commitments so far – is passed to each of these instances as a parameter, as is the subset of popular commitments held by the subsets of the population subject to L^{M4W} and L^{MONO} as generated by `get_ΣPOP'`:

$\Sigma POP^{M4W} = \{PRSC_{BENE}, PRSC_{M4W}, PRSC_{MP\text{-}AD}, PRSC_{AP\text{-}AD},$
$DESC_{M4W}, DESC_{MP\text{-}AD}, DESC_{AP\text{-}AD},$
$LINK_{MARRY}, LINK_{ADOPT}\}$

$\Sigma POP^{MONO} = \{PRSC_{BENE}, PRSC_{MW}, PRSC_{BISEX}, PRSC_{MP\text{-}AD}, PRSC_{AP\text{-}AD},$
$DESC_{MW}, DESC_{BISEX}, DESC_{MP\text{-}AD}, DESC_{AP\text{-}AD},$
$LINK_{MARRY}, LINK_{ADOPT}\}$

ΣPOP^{M4W} thus does not include $PRSC_{MW}$, $PRSC_{BISEX}$, $DESC_{MW}$ and $DESC_{BISEX}$ (the "monogamous" commitments), which are held only by members of the subset P^{MONO} (the "monogamous" subset of the population), while ΣPOP^{MONO} does not include $PRSC_{M4W}$ and $DESC_{M4W}$ (the "polygamous" commitments), which are held only by members of the subset P^{M4W} (the "polygamous" subset of the population).

The two recursive calls to `legislate` by L^{P} are thus:

`legislate (`LS^{M4W}`, `ΣPOP^{M4W}`, `ΣOUT^{P}`)` and

`legislate (`LS^{MONO}`, `ΣPOP^{MONO}`, `ΣOUT^{P}`),`

each of which returns a contribution to the emerging law.

[329] Other output commitments might be included in the set of endorsable output commitments, such as $OUT_{M\text{-}ECC}$ = "The definition of marriage is contested" and $OUT_{A\text{-}ECC}$ = "The definition of adoption is contested," but these are omitted for the sake of simplicity.

Let's look at the simpler of these two cases, i.e., the call to L^{M4W}.

The input commitments ΣINP^{M4W} are generated by a call to `get_ΣINP`, which weeds out the controversial prescriptive commitments from ΣPOP^{M4W}. Now that we are dealing only with "polygamists," the only controversial prescriptive popular commitments at the level of L^{M4W} are $PRSC_{MP\text{-}AD}$ and $PRSC_{AP\text{-}AD}$ (the prescriptive commitments relating to adoption), hence:

ΣINP^{M4W} = {$PRSC_{BENE}$, $PRSC_{M4W}$, $DESC_{M4W}$, $DESC_{MP\text{-}AD}$, $DESC_{AP\text{-}AD}$, $LINK_{MARRY}$, $LINK_{ADOPT}$}

What set of endorsable output commitments ΣOUT^{M4W} can be generated by the calls to the functions `negotiate` and `get_ΣOUT'`? This level of negotiation need not concern itself with $PRSC_{BENE}$, since the relevant output commitment was already generated at the next-higher level. Unlike at the previous level, the commitments $PRSC_{M4W}$ and $DESC_{M4W}$ are now uncontroversial, hence the legislature L^{M4W} could endorse both of the following proposed output commitments:

$INT^{M4W}{}_{PRSC\text{-}M4W}$ = "Any one man and up to four women shall be allowed to marry"

$INT^{M4W}{}_{DESC\text{-}M4W}$ = "Marriage is between a man and up to four women."

Since the commitment $OUT^{P}{}_{MARRY}$ "any adult person shall be allowed to marry" is already available to L^{M4W} as an output commitment, however, it may be used as a linking commitment to synthesize $INT^{M4W}{}_{PRSC\text{-}M4W}$ from $INT^{M4W}{}_{DESC\text{-}M4W}$:

$INT^{M4W}{}_{DESC\text{-}M4W}$ & $OUT^{P}{}_{MARRY}$ ➢ $INT^{M4W}{}_{PRSC\text{-}M4W}$

The explicit endorsement of $INT^{M4W}{}_{PRSC\text{-}M4W}$ is thus redundant; it suffices for L^{M4W} to endorse the output commitment corresponding to $INT^{M4W}{}_{DESC\text{-}M4W}$ "marriage is between a man and up to four women" to ensure that a man in P^{M4W} can marry up to four women in P^{M4W}.

$OUT^{M4W}{}_{DESC\text{-}M4W}$ = "Marriage is between a man and up to four women"

can thus be included in the set of output commitments ΣOUT^{M4W}.

No headway can be made in this legislative jurisdiction on the question of adoption, however: members of the population in the jurisdiction of L^{M4W} hold the conflicting prescriptive commitments $PRSC_{MP\text{-}AD}$ and $PRSC_{AP\text{-}AD}$ on this issue, which is why they were not included as input commitments. The only relevant input commitments for this legislature are

$DESC_{MP\text{-}AD}$ = "Adoption is between married persons and a child"

$DESC_{AP\text{-}AD}$ = "Adoption is between an adult person and a child" and

$LINK_{ADOPT}$ = "Any adult person ought to be allowed to adopt,"

which at most might generate the endorsable output commitment

OUT_{ADOPT} = "Any adult person shall be allowed to adopt,"

which was already endorsed at the next-higher level.

So the entire non-redundant set of output commitments generated by L^{M4W} so far is

$\Sigma OUT^{M4W} = \{OUT^{M4W}{}_{DESC\text{-}M4W}\}$

This instance of the recursive function `legislate` now reaches the if-condition: does the set of output commitments generated so far enjoy tight consensus? The set of output commitments generated so far is

$\Sigma OUT^{P} \cup \Sigma OUT^{M4W} = \{OUT^{P}{}_{BENE}, OUT^{P}{}_{MARRY}, OUT^{P}{}_{ADOPT}, OUT^{M4W}{}_{DESC\text{-}M4W}\}$

This set does *not* enjoy tight consensus in this legislative jurisdiction, since $OUT^{P}{}_{ADOPT}$ is still not sufficiently specified and hence not enforceable; the other output commitments in the set would in fact be (jointly) sufficiently specified and hence (jointly) enforceable in this legislative jurisdiction: $OUT^{P}{}_{BENE}$ has always been sufficiently specified, and $OUT^{M4W}{}_{DESC\text{-}M4W}$ & $OUT^{P}{}_{MARRY}$ are jointly sufficiently specified. So the entire set is *partially* sufficiently specified.

L^{M4W} does not have any child nodes, i.e., it is the bottom-most legislature along this branch of the legislative tree. No recursive call can be made, and the legislature must take a vote to generate its output commitments as a contribution to the emerging law. The output commitment $OUT^{M4W}{}_{DESC\text{-}M4W}$ has already been included, since it enjoys tight consensus in this legislative jurisdiction; the problem is what to do with adoption, since no tight consensus has been achievable. The issue will be decided by a vote: given the distribution of $DESC_{MP\text{-}AD}$ versus $DESC_{AP\text{-}AD}$ in the population and other contingent characteristics, *some* output commitment $OUT^{M4W}{}_{ADOPT}$ that is enforceable as a practical matter in this legislative jurisdiction will be adopted by a vote and included in the set of returned output commitments, such that:

$\Sigma OUT^{M4W} = \{OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}$

The set of output commitments generated so far is now

$\Sigma OUT^{P} \cup \Sigma OUT^{M4W} = \{OUT^{P}{}_{BENE}, OUT^{P}{}_{MARRY}, OUT^{P}{}_{ADOPT}, OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}$

All the output commitments in this set are now (jointly) sufficiently specified and hence enforceable, so the preliminary law

$\{\langle L^{M4W}, \{OUT^{P}{}_{BENE}, OUT^{P}{}_{MARRY}, OUT^{P}{}_{ADOPT}, OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}\rangle\}$

would also be enforceable.[330] This meets the `is_enforceable` if-condition, so the contribution

$\{\langle L^{M4W}, \{OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}\rangle\}$

is returned by the L^{M4W} instance of the recursive function `legislate` to the L^{P} instance of `legislate`, where it is added to that instance's emerging law LAW. Since LAW was previously empty, the emerging law LAW is now

$LAW = \{\langle L^{M4W}, \{OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}\rangle\}$

Together with the output commitments generated at the level of L^{P}, LAW is sufficiently specified with regard to the legislature L^{M4W}. The for-loop continues to the next iteration, where it makes the second recursive call,

`legislate (LS`^{MONO}`, ΣPOP`^{MONO}`, ΣOUT`^{P}`)`

We know that the set of popular commitments at the level of L^{MONO} is

$\Sigma POP^{MONO} = \{PRSC_{BENE}, PRSC_{MW}, PRSC_{BISEX}, PRSC_{MP\text{-}AD}, PRSC_{AP\text{-}AD},$
$DESC_{MW}, DESC_{BISEX}, DESC_{MP\text{-}AD}, DESC_{AP\text{-}AD},$
$LINK_{MARRY}, LINK_{ADOPT}\}$

i.e., the "monogamous" commitments. The controversial prescriptive commitments $PRSC_{MW}$ (the "heterosexual" prescriptive commitment) and $PRSC_{BISEX}$ (the "bisexual" prescriptive commitment) are not admissible as input commitments at this level; neither are the controversial prescriptive commitments $PRSC_{MP\text{-}AD}$ and $PRSC_{AP\text{-}AD}$ (relating to adoption). The set of input commitments to L^{MONO} will thus be:

$\Sigma INP^{MONO} = \{PRSC_{BENE}, DESC_{MW}, DESC_{BISEX}, DESC_{MP\text{-}AD}, DESC_{AP\text{-}AD}, LINK_{MARRY},$
$LINK_{ADOPT}\}$

But the incompatible descriptive commitments $DESC_{MW}$ "marriage is between a man and a woman" and $DESC_{BISEX}$ "marriage is between any two adults" cannot be used to generate an adequate output commitment along the lines of $OUT^{M4W}{}_{DESC\text{-}M4W}$ "marriage is between a man and up to four women," which in conjunction with $OUT^{P}{}_{MARRY}$ "any adult person shall be allowed to marry" is sufficiently specified. At most, they can be used to generate the following descriptive output commitment, which enjoys only *loose* consensus, even in conjunction with $OUT^{P}{}_{MARRY}$:

$OUT^{MONO}{}_{DESC\text{-}MONO}$ = "Marriage is between exactly two adults."

Although this is a weak output commitment, it allows *certain* enforcement actions to be taken at the level of L^{MONO} that were not yet possible at the level of L^{P}: for instance, all corollary legislation and aspects of

[330] Note that the helper function `is_enforceable` makes the counterfactual simplification described on p. 158, namely that the output commitments of the legislatures above the current legislature (in this case, of L^{P}) are all attributed to the *current* legislature (in this case, L^{M4W}), rather than to the respective legislatures above the current legislature (in this case, L^{P}).

OUT^{P}_{BENE} = "Married persons shall be entitled to a set of benefits arising from their married status, including in regard to taxation, inheritance, child custody, property, health and pension insurance, visitation rights and legal privilege, welfare benefits, and so on"

that depend on the *number* but not the *gender* of the married persons involved can now be effectively administered in the legislative jurisdiction of L^{MONO}, while they could not in the legislative jurisdiction of L^{P} as a whole.

Analogously to L^{M4W}, no output commitment with regard to adoption can be generated at the level of L^{MONO} that would enjoy tight consensus. So the entire non-redundant set of output commitments generated by L^{MONO} so far is

$\Sigma OUT^{MONO} = \{OUT^{MONO}_{DESC\text{-}MONO}\}$,

which does not enjoy tight consensus. The set of output commitments generated so far in this direct line of the legislative tree is thus

$\Sigma OUT^{P} \cup \Sigma OUT^{MONO} = \{OUT^{P}_{BENE}, OUT^{P}_{MARRY}, OUT^{P}_{ADOPT}, OUT^{MONO}_{DESC\text{-}MONO}\}$,

which likewise does not enjoy tight consensus. This instance of `legislate` must therefore invoke the *next* lower legislatures, L^{MW} and L^{BISEX}.

The ability of L^{MW} and L^{BISEX} to achieve tight consensus on the issues of marriage and adoption is analogous to that of L^{M4W}: tight consensus can be reached with regard to marriage, while a vote must be taken with regard to adoption. Accordingly, L^{MW} may generate a descriptive output commitment such as

$OUT^{MW}_{DESC\text{-}MW}$ = "Marriage is between a man and a woman"

while L^{BISEX} may generate a descriptive output commitment such as

$OUT^{BISEX}_{DESC\text{-}BISEX}$ = "Marriage is between any two adults."

Since both legislatures are at the bottom of the legislative tree, votes must be taken to generate the output commitments OUT^{MW}_{ADOPT} and OUT^{BISEX}_{ADOPT}.

L^{MW} will return the enforceable contribution

$\{\langle L^{MW}, \{OUT^{MW}_{DESC\text{-}MW}, OUT^{MW}_{ADOPT}\}\rangle\}$

and L^{BISEX} will return the enforceable contribution

$\{\langle L^{BISEX}, \{OUT^{BISEX}_{DESC\text{-}BISEX}, OUT^{BISEX}_{ADOPT}\}\rangle\}$

to the L^{MONO} instance of `legislate`. Inside the for-loop of that instance, `legislate` constructs the joint contribution of these two contributions:

$\{\langle L^{MW}, \{OUT^{MW}_{DESC\text{-}MW}, OUT^{MW}_{ADOPT}\}\rangle,\langle L^{BISEX}, \{OUT^{BISEX}_{DESC\text{-}BISEX}, OUT^{BISEX}_{ADOPT}\}\rangle\}$,

which is finally merged with

$\{\langle L^{MONO}, \{OUT^{MONO}{}_{DESC\text{-}MONO}\}\rangle\}$

to create

$\{\langle L^{MONO}, \{OUT^{MONO}{}_{DESC\text{-}MONO}\}\rangle, \langle L^{MW}, \{OUT^{MW}{}_{DESC\text{-}MW}, OUT^{MW}{}_{ADOPT}\}\rangle, \langle L^{BISEX}, \{OUT^{BISEX}{}_{DESC\text{-}BISEX}, OUT^{BISEX}{}_{ADOPT}\}\rangle\}$.

This contribution to the emerging law LAW is then returned to the L^{P} instance of `legislate`, where it is merged with the contribution from L^{M4W},

$\{\langle L^{M4W}, \{OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}\rangle\}$,

to create

$\{\langle L^{M4W}, \{OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}\rangle, \langle L^{MONO}, \{OUT^{MONO}{}_{DESC\text{-}MONO}\}\rangle, \langle L^{MW}, \{OUT^{MW}{}_{DESC\text{-}MW}, OUT^{MW}{}_{ADOPT}\}\rangle, \langle L^{BISEX}, \{OUT^{BISEX}{}_{DESC\text{-}BISEX}, OUT^{BISEX}{}_{ADOPT}\}\rangle\}$.

6.10.5 Adopting the law

The L^{P} instance of `legislate` now enters the final if-condition of the function, where the enforceability of the entire law

$\{\langle L^{P}, \{OUT^{P}{}_{BENE}, OUT^{P}{}_{MARRY}, OUT^{P}{}_{ADOPT}\}\rangle, \langle L^{M4W}, \{OUT^{M4W}{}_{DESC\text{-}M4W}, OUT^{M4W}{}_{ADOPT}\}\rangle, \langle L^{MONO}, \{OUT^{MONO}{}_{DESC\text{-}MONO}\}\rangle, \langle L^{MW}, \{OUT^{MW}{}_{DESC\text{-}M4W}, OUT^{MW}{}_{ADOPT}\}\rangle, \langle L^{BISEX}, \{OUT^{BISEX}{}_{DESC\text{-}BISEX}, OUT^{BISEX}{}_{ADOPT}\}\rangle\}$

is tested. This law is in fact now sufficiently specified and thus enforceable: by consulting this law, every member of the entire population P can determine the output commitments that bind her, and hence whom he or she may marry and under what conditions he or she may adopt, as well as the benefits that accrue to her by being married (at least as far as the involvement of the state is concerned). Not every member of the population will be bound by the same output commitments expressed by this law; only those output commitments are binding on a given person that are enforceable in the legislative jurisdiction to which that person is subject. [331]

Similarly, the law shows which output commitments may be enforced by the institutions of each legislative jurisdiction, and what the contribution to enforcement of each legislative jurisdiction may be. Cooperatively, all of the

[331] Naturally, no member of the population should be expected to consult law represented in pseudocode data structures; in practice, it would be available in plain English, just like any other law (to the extent any other law is written in plain English). For instance, a member of P^{BISEX} would be bound by the law expressing the following output commitments formulated in plain English, assuming that $DESC_{MP\text{-}AD}$ was endorsed as $OUT^{BISEX}{}_{ADOPT}$ by a vote: "Any adult person shall be allowed to marry; marriage is defined as between any and exactly two adults. Married persons shall be entitled to a set of benefits arising from their married status […]. Any adult person shall be allowed to adopt; adoption is defined as between married persons and a child."

legislative jurisdictions captured by the legislative structure LS^P enforce the law. In this sense, the law constitutes a recursive definition of marriage.

The law is returned to the top-level function `law_as_pluralism`, where it is assigned to the variable LAW. The set of laws already in force, ΣLAW, is now purged of any laws that are incompatible with LAW:

```
ΣLAW = purge_ΣLAW (LAW, ΣLAW)
```

Since this is the first iteration of `law_as_pluralism`, ΣLAW is still empty and nothing needs to be purged. ΣLAW is now supplemented by LAW:

```
ΣLAW = ΣLAW ∪ LAW,
```

so that the set ΣLAW now contains the single element

$LAW = \{\langle L^P, \{OUT^P_{BENE}, OUT^P_{MARRY}, OUT^P_{ADOPT}\}\rangle, \langle L^{M4W}, \{OUT^{M4W}_{DESC\text{-}M4W}, OUT^{M4W}_{ADOPT}\}\rangle, \langle L^{MONO}, \{OUT^{MONO}_{DESC\text{-}MONO}\}\rangle, \langle L^{MW}, \{OUT^{MW}_{DESC\text{-}M4W}, OUT^{MW}_{ADOPT}\}\rangle, \langle L^{BISEX}, \{OUT^{BISEX}_{DESC\text{-}BISEX}, OUT^{BISEX}_{ADOPT}\}\rangle\}$.

This completes the first legislative project of `law_as_pluralism`; the loop cycles back to the beginning, where

```
LS^P = get_LS (LS^P, ΣPOP^P)
```

is again executed.

6.10.6 Adjusting the legislative structure

While the first iteration of `law_as_pluralism` generated an adequate and enforceable law in regard to marriage in general, as aspired to under law as pluralism, it failed to generate an adequate and enforceable law in regard to the specific aspect of adoption. While the adoption aspect of LAW is enforceable as a practical matter, it is not *adequate*, since the corresponding output commitment was adopted by a vote – it does not enjoy tight consensus. The reason why the first iteration failed in this regard was in part due to the legislative structure itself: while LS^P mirrored the structure of the population with respect to the distribution of popular commitments relevant to the definition of marriage, it did not do so with respect to the distribution of popular commitments relevant to adoption. The execution of

```
LS^P = get_LS (LS^P, ΣPOP^P)
```

during the second iteration of `law_as_pluralism` allows this defect to be remedied: the legislative structure LS^P can be modified to account for the diversity of popular commitments relevant to adoption, for instance by creating overlapping legislative jurisdictions or expanding the legislative tree downward to include even smaller legislative jurisdictions than those subject to L^{M4W}, L^{MW}, and L^{BISEX}. [332] While the regulative ideal of law as pluralism may

[332] See Rosenfeld 2008 for suggestions on how just arrangements might work in practice.

never be fully implemented, it may at least be approached asymptotically, as practical enforceability allows.

This concludes the test of the formal definition of law as pluralism. Now that law as pluralism has been formally defined as a function and tested, the final chapter will consider what law as pluralism means in practice and how law as pluralism can be implemented in the real world of law and politics.

7 Implementing law as pluralism

7.1 Making justifications explicit

Law as pluralism relies heavily on the justificatory constraint of law as pluralism to ensure the adequacy of laws to the conflicting fundamental commitments of the entire population. Augmented by the multi-level considerations introduced in the previous chapter on "Recursive pluralism," the justificatory constraint of law as pluralism is defined as follows:

> Under law as pluralism, a popular commitment may serve as an input commitment for a legislature and hence as a justification for legislative proposals and the laws to which they give rise, and accordingly also for positions taken in that legislature in the defense of such proposals, if the popular commitment is (a) descriptive, or (b) prescriptive and held by the entire subset of the population subject to the jurisdiction of that legislature.

So far, we have considered only *isolated* laws generated by a given legislative process; we have not considered the emergence of a more or less coherent *body* of laws over time, other than simply noting that the set of laws ΣLAW must be updated continuously to include new laws, both by adding new laws and by purging old laws from the set that are incompatible with the new laws.

In order to ensure that a body of legislation is coherent in practice, which in turn helps ensure that the body of legislation is enforceable as a practical matter, more work must be done to keep track of the commitments that each of the legislatures has entered into when negotiating and adopting laws. The main way in which legislative commitments have been *endorsed* has been as *output commitments*, which serve as contributions to laws that are *adopted* by the legislatures making up the legislative system. But as some of the examples above have shown,[333] there is nothing in principle that prevents a legislature from endorsing *intermediate* legislative commitments, even if they are not formally adopted as output commitments contributing to a law.

In particular, there is nothing preventing a legislature from endorsing intermediate legislative commitments that serve as *justifications* for the output commitments that are actually adopted as part of laws. Any of the input commitments admissible under the justificatory constraint of law as pluralism and the intermediate commitments derived from those input commitments may in principle serve as justifications for output commitments, and they may in principle be endorsed by the legislature, whether they are endorsed *as* output commitments or not.

Endorsing an intermediate commitment that serves as a justification for an output commitment, and hence for a law, allows subsequent legislative processes (and extra-legislative review mechanisms, in particular courts, as will be discussed in section 7.3 on "Constitutional rules and meta-constitutional rules" below), to ensure that new legislation *fits* with those

[333] Such as the endorsement of $LINK_2$ in subsection 5.4.3 above.

existing justifications, rather than simply throwing old legislation overboard that is incompatible with the new legislation. This helps legislatures (and courts) ensure a degree of **integrity** of the body of legislation that is not achievable otherwise.[334] By *making justifications explicit* in this way,[335] i.e., by expressing the commitments used as justifications that otherwise would remain unexpressed, legislatures (and courts) have the tools at their disposal to decide whether the justifications used in the adoption of existing law shall likewise be used to justify the adoption of new law, or whether those old justifications shall be disregarded. Making justifications explicit thus gives legislatures the tools to balance the relative weight of existing legislation and new legislation, and it gives courts the tools to decide what precedential value existing legislation should have when reviewing new legislation.[336]

It would be unrealistic to expect a body of legislation to be fully coherent, or to expect all justifications used in the negotiation and adoption of laws to be made explicit.[337] Even at a given legislative level, a certain degree of ambiguity is sometimes desirable to ensure (tight or loose) consensus or at least sufficient agreement to adopt a law, as well as to ensure practicability of enforcement – utter precision would strangle the legislative process. Nevertheless, making justifications explicit by providing a record of endorsed but unadopted legislative commitments (in particular justifications of output commitments) helps ensure that new legislation is not an *alien element* in a

[334] This conception of integrity is a legislative counterpoint to "law as integrity" developed by Dworkin 1986, especially in 176-275: while Dworkin is concerned primarily with integrity as a guide for legal *interpretation*, paradigmatically by courts, integrity under law as pluralism is concerned with *lawmaking* by legislatures. See Dworkin 1986, 225: "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." Dworkin's project is to rein in the threat of legal positivism with reference to the correct moral principles of the society within which laws are made; integrity under law as pluralism in turn constrains the discretion that an interpreter of the law may exercise in determining what those principles are and hence in developing the "best constructive interpretation of the community's legal practice." Dworkin himself believes that integrity on the lawmaking side is a virtue; he calls this the "legislative principle" of political integrity. See Dworkin 1986, 176: "We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible." But law as pluralism is not concerned with the *moral* coherence of legislation per se, given that morality is itself essentially contested and derived from potentially conflicting fundamental commitments; instead, it aims to achieve *pragmatic* coherence of legislation in the sense that the conditions for divergent interpretations of output commitments are specified by the legislative process itself. Integrity under law as pluralism is thus akin to but weaker than Dworkin's legislative integrity. See Marmor 2007, 39-56, for a similarly motivated critique of Dworkin's legislative integrity from the perspective of pluralism.

[335] The project of "making justifications explicit" is of course inspired by Brandom 1994's project of making "it" explicit (in the domain of communication in general) and Klatt 2008's project of making "the law" explicit (especially in regard to legal argumentation and interpretation).

[336] As Oliver-Lalana 2005 argues, making justifications explicit helps enhance the *legitimacy* of legislation. Waaldijk 1987 considers the feasibility of *requiring* legislatures to state the reasons for their legislative decisions. This paper does not go so far as to require legislatures to make (all) their justifications explicit: it merely indicates *how* justifications could and should be made explicit, and what this would entail in the context of law as pluralism.

[337] On the political and practical limits to legislative integrity, see Marmor 2008 and Marmor 2007, 39-56. See Dahlman 2002 for a similarly motivated critique and the respective role of Dworkin's "rules" and "principles" in legislative integrity.

given body of law, and it helps *hold legislators and legislatures to the commitments* they have previously endorsed.

Nothing prevents existing commitments from being purged in the same way that obsolete laws are purged; whether a commitment continues to be held by a legislator or a legislature is the decision of that legislator or legislature (or the court reviewing the legislation; see subsection 7.3.2 on "Judicial review of law as pluralism" below). But keeping track of the commitments endorsed (or, in Brandom's terminology, keeping a "set of books" on those commitments,[338] allows the web of commitments and entitlements that justify laws to be updated methodologically and coherently, rather than haphazardly.

For instance, if a legislature has previously justified an output commitment (as a contribution to a law expressing that output commitment) such as $OUT_{PROHIBIT}$ "abortion shall always be prohibited" in terms of an intermediate commitment INT_{SACRED} "innocent human life is sacred," then a new output commitment $OUT_{PRENATAL}$ "prenatal health care shall not be subsidized" may require a modification of the endorsement of the existing intermediate commitment INT_{SACRED}, or at least an additional set of justifications to show how $INT_{SACRED} \succ OUT_{PROHIBIT}$, but not $OUT_{PROHIBIT} \rightarrow *OUT_{PRENATAL}$. And if INT_{SACRED} is abandoned in light of the desire to endorse $OUT_{PRENATAL}$ (say, if $OUT_{PRENATAL}$ only enjoys tight consensus in a given legislative jurisdiction if that jurisdiction no longer endorses INT_{SACRED}), then this might call for concomitant modifications of $OUT_{PROHIBIT}$ in the next iteration of the legislative process.

Making justifications explicit in practice is not difficult: in the algorithmic definition of law as pluralism elaborated in the last chapter, it simply requires another global variable analogous to ΣLAW which stores all the intermediate commitments *endorsed* but *not adopted as part of a law* by all the legislatures in the legislative structure. Call this set of explicit justifications ΣJUST. The structure of ΣJUST will be analogous to the structure of ΣLAW, i.e., a set of pairs of legislatures and the intermediate commitments they endorse but do not adopt. The mechanisms for negotiating and endorsing the commitments included in ΣJUST will be identical to those relevant to ΣLAW, and both ΣJUST and ΣLAW will be available as input to the legislative processes in all of the legislatures. The only difference is that ΣLAW contains the laws that have been *adopted*, while ΣJUST contains the intermediate commitments that have been endorsed but *not* adopted as part of a law.[339] Expanding the algorithmic definition of law as pluralism is thus straightforward: in parallel with the operations affecting ΣLAW, equivalent operations can be introduced that affect ΣJUST.[340]

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[338] See Brandom 1994, 590, and section 5.2.2.

[339] Or more precisely: ΣLAW contains those laws that are *potentially adopted* under law as pluralism, i.e., that are adequate and enforceable; whether a law is *actually* adopted depends on the contingent characteristics that lead a legislature to choose one adequate and enforceable law over another.

[340] In fact, the algorithmic definition of law as pluralism included in the Appendix need not be modified at all, if each element of ΣLAW is understood to include information as to whether the endorsed commitments in question have been adopted as part of a law or not; this can be done simply by changing the data type of LAW from a set of pairs of legislatures and their endorsed commitments to a set of triples of legislatures, their endorsed commitments, and a flag indicating whether the commitment has been adopted as a law or not.

Even without law as pluralism, legislatures are often already interpreted as having endorsed commitments without formally adopting them as law: these endorsed but unadopted commitments may include preambles to legislation,[341] records of legislative negotiations, legislative committee reports, statements before and after the vote,[342] and so on.[343] These sources are often consulted (inter alia by courts) in the attempt to ascertain the *intent* or *purpose* of the legislature in adopting a given law.[344] So ΣJUST may often already be implicitly assumed as the background or context of the set of laws ΣLAW, thus serving as an aid in the interpretation of ΣLAW. Under law as pluralism, the recording of such unadopted commitments is simply more explicit and systematic – a task made simpler by the need to comply with the justificatory constraint of law as pluralism and the other justificatory methods elaborated in chapters 4 and 5 on "The justificatory constraint of law as pluralism" and "Decomposing and synthesizing commitments."[345]

The following sections on "Rules of legislative procedure" and "Constitutional rules and meta-constitutional rules" will discuss how making justifications explicit can be used to facilitate and monitor the implementation of law as pluralism.

7.2 Rules of legislative procedure

7.2.1 Enforceable and binding rules

Since law as pluralism primarily concerns *legislation*, the implementation of law as pluralism focuses initially on the activities of *legislatures* and the *legislators* that constitute them. The algorithmic definition of law as pluralism

[341] Although preambles are usually considered part of the adopted legislation; their role in justification is often greater in international treaties than in national legislation. See concerns on the preamble of the New START Treaty expressed by McCain 2010. On the potential use of justifications in preambles and a critique thereof, see Greenawalt 1995, 59.

[342] See Greenawalt 1995, 110, on the publicity of justifications contained in committee reports, etc.

[343] Or in the case of American constitutional norms, *The Federalist Papers* and the records of the Philadelphia Convention and the state ratification conventions. See Rakove 1996, especially 3-22, for an analysis of the historical possibilities and difficulties in ascertaining the original justifications relevant to the U.S. Constitution.

[344] See Waldron 1999a, 145-146: "[S]ome American judges make a practice of appealing to certain statements on the legislative record (a formal committee report, for example, or the unchallenged statement of a bill's manager) which do not traditionally count as part of [the] text of the statute they are considering. It seems to me that Ronald Dworkin has this exactly right when he says in effect that the judges are developing a practice of recognizing such statements as *acts of the legislature* and that legislators are responding to that recognition by producing statements that are intended to be taken in that way. Nothing I have said is incompatible with these practices: they represent in effect a gradual modification of the legal system's rule of recognition from the judges' side, and, as far as the legislature is concerned, they represent a gradual modification of its constitutive procedures [internal citations omitted]."

[345] For a skeptical account of making justifications explicit, or what Ely calls an "articulation requirement," see Ely 1980, 125-131. But the proposal here is not that legislators be *required* to articulate their reasons; only that there are certain advantages to doing so, in light of the desire to achieve adequate legislation, and that when legislators in fact do so, only certain justifications ought to be admissible.

provides *rules* (in the form of functions) that can be followed in order to ensure that a legislature generates laws that are in fact adequate and enforceable as defined under law as pluralism. One might envision interpreting such rules as voluntary or moral principles of conduct, compliance with which would be a convenient but ultimately fickle way of facilitating the pluralistic legislative process.[346] But one of the advantages of defining these rules algorithmically is that they are actually *enforceable* and can hence be treated as *binding* on legislators. *Rules of legislative procedure* are a natural medium for expressing these binding rules.[347]

Law as pluralism relies to a considerable extent on the (potentially non-algorithmic) *skills* of legislators in proposing popular commitments as input commitments (even before the legislative process as such commences) and in bridging the gap from admissible input commitments to proposed output commitments (i.e., what happens within the black box of the function `negotiate`). The exercise of these skills is not subject to enforceable rules: whether a legislator does in fact engage skillfully in negotiations is ultimately the legislator's own responsibility (and the responsibility of the legislator's constituency). But certain important features of law as pluralism are at least partially algorithmic and hence potentially enforceable by way of rules of legislative procedure: most saliently, the *justificatory constraint of law as pluralism* and the *termination conditions* of recursive pluralism. The enforcement of rules of legislative procedure governing these two features of law as pluralism is facilitated by making justifications explicit as discussed in the previous section.

7.2.2 Enforcement of the justificatory constraint and termination conditions

The justificatory constraint of law as pluralism can, for instance, be enforced using rules of procedure as follows: within any legislative negotiation, justifications for or against legislative proposals *shall only be permissible if they are expressed in terms of descriptive popular commitments, uncontroversial prescriptive popular commitments, or legislative commitments derived from such popular commitments*. If a legislator argues in favor of or against a legislative proposal using controversial prescriptive popular commitments as justifications, these justifications shall be deemed inadmissible by the legislator and shall be stricken from the legislative record, and the legislator shall be barred from continuing the argument along these lines.[348] Moreover, the inadmissible justifications may not be *endorsed* by the legislature as a justification for the output commitments actually adopted. These rules of procedure can be administered and enforced by the person chairing the

[346] This is generally the way *public justification* is conceived; but see n. 196 on p. 81.
[347] They can thus be seen as part of the implementation of the "secondary rules" in Hart 1994's formulation of legal positivism. See Hart 1994, 80-81, and n. 160 on p. 64.
[348] This is similar to the striking of statements from court records that are deemed inadmissible by the judge; in the case of legislatures, this might be implemented by an analogous procedure according to which other legislators raise objections, or according to which the chair of the negotiations has (contestable) authority to strike inadmissible justifications from the legislative record. It is also similar to legislative rules requiring legislators' speeches to be on point.

legislature or committee in question (subject to scrutiny by the members of the legislature or committee, for instance).

Similarly, the *termination conditions* of recursive pluralism can likewise be enforced using rules of legislative procedure. The default procedure under law as pluralism is for negotiations in a given legislature to continue until tight or loose consensus has been reached. If tight consensus is reached, there is no need for a vote and hence no additional termination condition arises.[349] If only loose consensus is achieved, the task of legislating is delegated to the next-lower legislatures, if there are any. As defined in the function `legislate`, a termination condition is invoked and a vote is taken only if (a) *the law as further specified by the lower-level legislatures is deemed unenforceable as a practical manner*, or (b) *no lower-level legislatures are available* to further specify an emerging law that enjoys only loose consensus.

Where termination condition (a) applies, if the legislature decides that a vote must be taken because the law would otherwise be unenforceable, the legislature should provide a *justification* why this is so. Accordingly, the legislature should *endorse* a legislative commitment explaining why a vote is being taken at that level instead of delegating further specification of the law to lower-level legislatures. Once such a justification has been endorsed by a legislature, that legislature can be *held to that justification* in future iterations of the legislative process, i.e., when future laws are negotiated. If, at some point in the future, the justification is deemed lacking – or incompatible with the goals of the future legislation – the original law settled by the vote could be revisited accordingly. The rules of legislative procedure might thus specify that if a vote is taken where an emerging law is deemed unenforceable, the legislature must endorse a justification of that decision.

Where termination condition (b) applies, it is normally straightforward to justify why a vote is being taken: simply because no lower-level legislatures are available to further specify the law. But recall that the function `get_LS` gives the legislative structure the opportunity to reorganize itself should the adequacy of laws regularly be in danger. If a given legislative structure regularly fails to achieve tight consensus on laws, then the burden of proof is on the legislative structure to justify why it should be maintained notwithstanding the regularly inadequate output – and that justification must relate to the practical enforceability of the laws outputted by the legislative structure. So the rules of legislative procedure might specify that if a vote is taken because no lower-level legislatures are available, the legislature must endorse a justification as to why the existing legislative structure should nevertheless be maintained on grounds of practical enforceability – or it should endorse a recommendation that the legislative structure in fact be reorganized.

The two termination conditions and the justifications for invoking them put a practical check on the theoretical excesses of law as pluralism. If law as pluralism were implemented radically, a single legislator with an outlying commitment – or even a single member of the population with an outlying

[349] As always, at least as far as fundamental commitments are concerned: a vote may still be taken on grounds of contingent characteristics, in which case one of the options enjoying tight consensus under law as pluralism is selected for adoption.

commitment, assuming that all popular commitments would be represented in the legislature – would be able to prevent consensus in a given legislature and potentially force the expansion of the legislative structure to take account of that outlying commitment. The two termination conditions prevent this scenario from happening, if the scenario is unenforceable as a practical matter: termination condition (a) ensures that in a given legislature structure, an outlier cannot hold consensus hostage at the cost of enforceability, while termination condition (b) ensures that an outlier cannot demand a reorganization of the legislative structure at the cost of enforceability. The two termination conditions ensure that the regulative ideal of law as pluralism is implemented *to the extent achievable*, but where implementation is not possible as a matter of practical enforceability, justifications must be given as to why full implementation is not enforceable.

7.2.3 Examples of rules of legislative procedure

Rules of legislative procedure enforcing law as pluralism would thus include at least the following rules:

- A rule according to which any justification for positions taken by legislators in legislative negotiations be framed in terms of descriptive popular commitments, uncontroversial prescriptive popular commitments, or legislative commitments derived from such popular commitments (the *rule on justification of proposals*).
- A rule according to which any justification endorsed by the legislature be framed in terms of descriptive popular commitments, uncontroversial prescriptive popular commitments, or legislative commitments derived from such popular commitments (the *rule on justification of laws*).
- A rule according to which the legislature must justify a vote taken where an emerging law is deemed unenforceable as a practical matter (the *rule on justification of unenforceability*).
- A rule according to which the legislature must justify why the existing legislative structure should be maintained on grounds of practical enforceability, notwithstanding the fact that no lower-level legislatures are available to further specify a law (the *rule on justification of the legislative structure*).

The first rule concerns justifications endorsed by legislators *within* the legislative process; the other three rules concern justifications endorsed by legislatures and made available *beyond* the legislative process (namely, as part of the set of endorsed but unadopted legislative commitments ΣJUST).

Note that only the rule on justification of unenforceability and the rule on justification of the legislature structure *require* that a justification be offered. These two rules concern the two termination conditions: if the regulative ideal of law as pluralism is deviated from, i.e., if adequacy is achieved only imperfectly, then the legislature is required to justify that deviation (say, in the legislative record or in the preamble to the legislation in question). The other two rules require only that *if* a justification is offered, it honor the justificatory constraint of law as pluralism. Whether a legislator decides to

justify a proposal or a legislature decides to justify a law depends on whether the legislator/legislature desires to make her/its *intent* explicit with regard to the proposed or adopted law. Where there is no such desire, no justification need be provided. The disadvantage (for the legislator/legislature) of providing such a justification is that the legislator/legislature can subsequently be *held to that justification*, with possible implications for the negotiation and adoption of future laws; the advantage (for the legislator/legislature) of providing such a justification is that the legislator/legislature thus makes it more difficult to interpret the proposed or adopted law in a manner contrary to the original intent.[350]

These four rules on justification (of proposals, laws, unenforceability, and the legislative structure) help address the potential difficulty of *strategic behavior* on the part of legislators and legislatures: namely where legislators or legislatures *claim* that a disagreement relates to fundamental commitments (and hence competing prescriptive popular commitments are excluded as justifications for proposed and adopted laws), but where the disagreement *actually* relates to contingent characteristics.[351] The four rules on justification make it easier to hold legislators and legislatures to the commitments they have previously endorsed; if such commitments were endorsed merely as a front for concealed contingent characteristics, the commitments are now nevertheless part of the web of commitments justifying the laws, regardless of whether the commitments were endorsed out of conviction or strategy. By endorsing a commitment strategically, legislators and legislatures must expect to be held to that commitment in the negotiation and adoption of future laws – even where the originally concealed contingent characteristics might make a different outcome desirable. The rules on justification ensure that if a contingent characteristic is masked by a purported commitment, the mask remains even after the legislative project at issue is finished.

In addition to these four rules on justification, the following *rule on integrity* ensures the consistency of the set of laws ΣLAW and their compatibility with the set of endorsed but unadopted commitments ΣJUST:

- A rule according to which any law endorsed by the legislature must be consistent with the laws and justifications already endorsed, or else the incompatible laws and justifications already endorsed must be modified or invalidated accordingly (the *rule on integrity*).

The rule on integrity ensures that new laws fit into the existing sets of laws and justifications endorsed by the legislative system, or that the function

[350] As Atienza 2005, 309 points out in regard to legislative justifications: "It is not true, for example, that each party feels committed to replying to the objections raised by the other party to their thesis (instead, the questions that may appear awkward are avoided); neither is it presupposed that the principle of sincerity, that of universality or that of avoiding ambiguity in the use of language, govern." Individual legislators, or the legislature as a whole, may opt *not to play* the game of "giving and asking for reasons." If they do play the game, they may choose to make their justifications explicit; if not, their justifications will remain tacit or under- or overdetermined.

[351] As discussed in subsection 1.4.4 above, law as pluralism does not assume that fundamental commitments can be separated cleanly from contingent characteristics; but it does assume that fundamental commitments are in fact used as justifications for proposed and adopted laws, and that such talk is meaningful independently of contingent characteristics.

`purge` is executed properly to eliminate old laws that have become incompatible with the new laws.[352]

7.2.4 Demands on the professionalism of legislators

Rules of legislative procedure implementing law as pluralism place considerable demands on the professionalism and skills of legislators. By joining a legislature, a legislator commits herself to pluralism as embedded in the rules that constrain the legislative process, in the same way that the legislator commits herself to the other requirements of the job. Committing oneself to pluralism is never easy – even when that commitment to pluralism comes with the rules of the game that are part of the job description.

In particular, legislators must learn to justify their legislative proposals, and their support of other legislators' proposals, in terms of descriptive or uncontroversial prescriptive commitments. They must learn not to invoke controversial prescriptive commitments as justifications – or they must suffer the penalties imposed by the legislature for their failure to comply with the justificatory constraint of law as pluralism.[353] And they must learn to identify when other legislators invoke such inadmissible justifications, so that they may respond accordingly. These demands obtain all the more for the chair of the legislature in charge of enforcing the rules of procedure – she must be able to recognize when inadmissible justifications are brought forward by legislators, or when the legislature as a whole is in danger of violating the rules of legislative procedure.

At the same time, legislators must develop the skills necessary to decompose and synthesize commitments in such a way that they may serve as effective, but admissible justifications; in particular, if they want to ensure that controversial prescriptive popular commitments may nonetheless be relevant to the output of the legislature, they must be decomposed and synthesized skillfully so that they can be smuggled in as descriptive or uncontroversial commitments.

Legislators under law as pluralism may therefore not speak as "freely" as legislators in, say, a contemporary representative democracy, in the sense that their legislative speech is subject to more constraints. These constraints are not greater than those imposed on lawyers arguing before a court, however, or than those imposed on judges adjudicating a court case. It is a historic oddity of legislatures that they traditionally impose fewer constraints on their members than do courts on their members and parties[354] – an oddity perhaps

[352] Because of the practical and political limits to the desirability of legislative integrity as explored by Marmor 2007, 39-56, one might opt to formulate this rule less strictly than the other four rules.

[353] Penalties that may be as mild as having the offending justification stricken from the record; or as severe as the legislature may deem necessary to enforce its rules of procedure.

[354] An oddity that also struck James Madison, for instance, when thinking through his constitutional proposals in Philadelphia; see Rakove 1996, 35-56. Gutmann and Thompson 1996, 91, make this comparison explicit: "The principles [of accommodation] imply that the forums in which we conduct our political discussion should be designed so as to encourage officials to justify their actions with moral reasons, and to give other officials as well as citizens the opportunity to criticize those reasons. Legislators, for example, might act more

motivated by the idea that legislators should be common people like the people they represent. But to the extent that idea ever corresponded to the truth, it seldom does today, especially in the highly professionalized legislatures of pluralistic societies.[355] There is no prima facie reason why professional legislators should not be expected to abide by rules of the sort proposed under law as pluralism – especially where the adequacy of legislation to fundamental commitments is at stake.[356]

This is also true where the rules in question are monitored by institutions *beyond* the legislature. So far, we have seen how the rules on justification can be implemented as (internal) rules of legislative procedure; but as the following section will show, they can also be implemented as rules imposed externally on the legislature as constitutional rules or meta-constitutional rules.

7.3 Constitutional rules and meta-constitutional rules

7.3.1 What are meta-constitutional rules?

The difference between constitutional rules and meta-constitutional rules is that constitutional rules are expressly embodied in a constitution[357] (or in the body of constitutional law expressly referring to a constitution[358]), while meta-constitutional rules concern the manner in which constitutional rules are interpreted and applied.[359] The Eighth Amendment of the U.S. Constitution ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"), for instance, expresses several constitutional rules, as do the rules expressed in case law interpreting the Eighth Amendment.[360] Similarly, the amendment process set out in Article V of the U.S. Constitution consists of constitutional rules. The manner in which the U.S. Constitution originally came into being, however, is a paradigmatic example of a process governed by meta-constitutional rules: no constitutional mechanisms existed for bringing the U.S. Constitution into being.[361] Similarly,

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like judges by assuming a regular responsibility to explain in writing, in principled terms, the basis for their decisions."

[355] Exceptions may be the part-time legislatures of countries such as Switzerland or Liechtenstein, or the local and regional legislatures of political subdivisions, especially in rural areas. But these legislatures are not prototypes of the kind of legislatures that have to deal with a broad diversity of conflicting fundamental commitments.

[356] As it is, most legislatures in theory already burden their members with considerable technical demands relating to the complexity of the legislation they are expected to negotiate and the language in which that legislation is expressed – although in practice, many of those technical skills are outsourced to the executive branch or to professional legislative staff. This may in itself be a reason to expect more professionalism and technical skills of legislators, if only to ensure that they live up to their job description as *lawmakers*, rather than as figureheads or marionettes of the true legislative wizards hiding behind the curtain.

[357] Whether written or not; the distinction between constitutional rules and meta-constitutional rules is likely crisper in the case of written constitutions, however.

[358] E.g., constitutional case law, treatises recognized as a source of constitutional law, and the like.

[359] For an overview of meta-constitutionalism within the context of the European Union, see Walker 2000.

[360] For instance the comparatively recent interpretation that imposing the death penalty on minors constitutes cruel and unusual punishment; see *Roper v. Simmons*.

[361] See Rakove 1996, especially 23-34.

the various methods employed for interpreting the constitutional rules set out in the U.S. Constitution and case law are examples of meta-constitutional rules: "strict constructionism," "textualism," "originalism,"[362] "interpretivism,"[363] "the living constitution,"[364] and so on, are not defined by constitutional rules set out in the Constitution itself or in binding constitutional law; rather, these judicial philosophies are derived from *beyond* the Constitution (say, from law review articles and other non-binding academic writings, judicial confirmation hearings, and the private and public musings of judges and law professors) in order to interpret the Constitution. The doctrine of judicial review in the United States is a constitutional rule derived from Article III of the Constitution and case law such as *Marbury v. Madison*; the fact that a Supreme Court ruling such as *Bush v. Gore* is actually implemented is guided by a meta-constitutional rule that the Supreme Court should be accorded the last word on such controversies, even where it has lost its collective mind.

For the purpose of law as pluralism, it matters not whether a given rule is constitutional or meta-constitutional: what matters is that – in contrast to rules of legislative procedure – the rule is administered, interpreted, and enforced by an entity *other than the legislature*. While constitutional rules often help avoid the ambiguity and uncertainty arising from meta-constitutional rules, meta-constitutional rules may be just as effective as constitutional rules in ensuring the proper functioning of a constitutional system, and in particular the proper functioning of the legislative process. In most cases, the extra-legislative bodies administering, interpreting, and enforcing constitutional rules are courts and the enforcement bodies entrusted with executing their orders; while other extra-legislative bodies are conceivable,[365] the following discussion will focus on constitutional and meta-constitutional rules within the purview of courts.

The three rules defined in the last section concerning justifications endorsed by *legislatures* (namely the rules on justification of laws, unenforceability, and the legislative structure) can be implemented just as easily as constitutional or meta-constitutional rules as they can as rules of procedure: the set of endorsed but unadopted justifications ΣJUST is available for appraisal both within and beyond the legislature. The same applies to the rule on integrity. The choice whether to implement these rules as rules of procedure, constitutional rules, meta-constitutional rules, or a combination thereof depends on the respective roles accorded to legislatures and extra-legislative bodies, in particular courts: where legislatures are trusted sufficiently to

[362] U.S. Supreme Court Justice Antonin Scalia, a self-proclaimed textualist, discusses the distinctions between strict constructionism (advocating a "strict" reading of the text), textualism (advocating a "reasonable" reading of the text, ostensibly without reference to purported legislative intent and history), and originalism (with reference to purported legislative intent and history) in Scalia 1997.

[363] Of which Dworkin 1986 is the quintessential statement.

[364] See McBain 1927. For a more recent statement of the idea of a "living" or evolving constitution, see Sunstein 2009.

[365] In Liechtenstein, for instance, the Reigning Prince has the last word on questions of constitutional interpretation (see article 112(2) of the Constitution of Liechtenstein) and may dissolve Parliament at will (subject to justification; see article 48(1) of the Constitution of Liechtenstein).

manage their own affairs,[366] rules of legislative procedure suffice; where courts or other extra-legislative bodies are believed to be capable of doing a better job in this regard than legislatures, constitutional or meta-constitutional rules will be preferable.[367] The rule concerning justifications endorsed by *legislators*, on the other hand, is properly implemented only as a rule of legislative procedure: the justifications endorsed by individual legislators are intermediate commitments available only within a given legislature, unless they are endorsed by the legislature as a whole (in which case, the rule on justification of laws would apply).

The following subsection will consider judicial review under law as pluralism, in which the three rules on justification applicable to legislatures and the rule on integrity are implemented as constitutional or meta-constitutional rules by the courts.

7.3.2 Judicial review of law as pluralism

In the most general terms, judicial review of a law amounts to verification by a court whether the law complies with the applicable constitutional and meta-constitutional rules in the court's jurisdiction.[368] Such constitutional rules may be substantive or procedural, or a combination of both: as Tribe has argued, the very distinction between substantive and procedural judicial review is problematic.[369] While this may be true of constitutional systems in general, the three rules on justification applicable to legislatures set out in the last chapter and the rule on integrity are at least predominantly procedural: they concern the mechanisms by which laws have been adopted, and whether those mechanisms complied with the procedures set out in the algorithmic definition of law as pluralism. Whether a justification honors the justificatory constraint of law as pluralism or whether a termination condition is properly justified in terms of enforceability as a practical matter has little to do with the substance or content of the law in question: it has to do with the procedures by which the law was adopted. In this sense, the three applicable rules on justification and the rule on integrity are part of the *rule of recognition* used to ascertain whether a given law properly belongs in the set of laws, i.e., whether its adoption meets the criteria necessary for it to be considered part of the body of law of a given legal system.[370] Whether judicial review can be

[366] Waldron 1999a, Tushnet 1999, and Kramer 2004 contain recent arguments in favor of letting the legislature determine the constitutionality of its own laws. To a great extent, this is also the rule in countries such as the United Kingdom, where Parliament is deemed sovereign; but see *Human Rights Act 1998*. Cf. also direct democracies such as Switzerland, where decisions by the people are generally not subject to judicial review (unlike U.S. states such as California; see, e.g., *In re Marriage Cases*).

[367] This is the dominant strain in American constitutional thinking, e.g., Ackerman 1991, Dworkin 1986, Scalia 1997, Tribe 2008, Posner 2008, Sunstein 2009, Breyer 2010, and is also common in other countries with a strong tradition of judicial review and legislative malfeasance, e.g. Germany.

[368] Judicial review of a law may be in the abstract or as applied (*abstrakte* vs. *konkrete Normenkontrolle*); the difference is irrelevant here. On the "case or controversy" requirement of the U.S. Supreme Court, see Article III, section 2 of the U.S. Constitution, and the discussion in Stone, Seidman, Sunstein, and Tushnet 1996, 88-90. The extent of judicial review may shift over time; on the recent change in France, see Hieber 2010.

[369] See Tribe 1980.

[370] See Hart 1994, 100-110.

procedural in an actual constitutional system is an open question, but a procedural approach to judicial review is appropriate specifically in regard to the three rules on justification applicable to legislatures and the rule on integrity.

How, then, would a court consider a given law that comes up for judicial review under law as pluralism? The input to judicial review under law as pluralism would consist of the law LAW, the set of laws in force ΣLAW, and the set of justifications of those laws endorsed by the legislatures ΣJUST. The court then considers these inputs in light of the three rules on justification applicable to legislatures (the rule on justification of laws, unenforceability, and the legislative structure) and the rule on integrity. First, let's consider the rule on justification of laws:

> Any justification endorsed by the legislature must be framed in terms of descriptive popular commitments, uncontroversial prescriptive popular commitments, or legislative commitments derived from such popular commitments.

Given a law LAW, the court will check the commitments in ΣJUST used to justify LAW. If such a commitment JUST fails the rule's test, i.e., if the commitment is a controversial prescriptive popular commitment or is only derivable from controversial prescriptive popular commitments, then the court will invalidate both JUST and LAW (or any output commitments expressed by LAW that are justified in terms of JUST). If LAW can be justified by commitments in ΣJUST *other* than the inadmissible commitment JUST, the court has the option of reinstating LAW (or the relevant output commitments expressed by LAW), but with an admissible justification rather than the justification offered by the legislature.

This straightforwardly implements the justificatory constraint of law as pluralism as applied to legislatures. The rule on justification of laws fits closely together with the rule on integrity, so we shall consider that rule next:

> Any law endorsed by the legislature must be consistent with the laws and justifications already endorsed, or else the incompatible laws and justifications already endorsed must be modified or invalidated accordingly.

Even if the commitments used to justify a law LAW are admissible according to the rule on justification of laws, or even if *no* commitments in ΣJUST have been used by the legislature to justify LAW (i.e., the legislature has simply adopted LAW without justification), then LAW may still be attacked by a plaintiff on the ground that it is incompatible with commitments contained in either ΣLAW or ΣJUST that have been endorsed in the past in the same legislative jurisdiction as the relevant commitments expressed by LAW. LAW may thus be found to be inconsistent with either ΣLAW or ΣJUST. These two cases will be considered separately in the following.

If the court finds that LAW is inconsistent with ΣLAW, then the legislature has failed to purge ΣLAW of laws incompatible with LAW. This may be deliberate: the legislature may believe that an old law is compatible with a

new law, whereas, in the view of the court, it is not. The paradigmatic case is when a new law conflicts with an old constitutional (or otherwise superordinate) norm: the legislature may believe that the law is compatible with that norm, while the court holds that it is not. The court then has two options: it may either modify LAW to make it compatible with the old norm or invalidate it entirely, or it may modify the old norm to make it compatible with LAW or invalidate it entirely. Which option the court chooses will depend on the respective relationships of each norm with ΣLAW as a whole, and whether one of the two norms enjoys a status superordinate to the other. This captures review of the constitutionality of laws as a special case of the rule on justification of laws: if a new law is incompatible with old, superordinate norms, then the new law is deemed invalid.

If the court finds that LAW is inconsistent with ΣJUST, then the legislature has failed to respect the integrity of the body of legislation in terms of its justifications: the commitments it has used in the past to justify other laws are incompatible with the new law LAW. The new law LAW is thus not *adequate* to the popular commitments that have been used to justify laws in the past. This may be either because the popular commitments have changed over time, or because the legislature is trying to have it both ways: using one set of commitments to justify a given law LAW_{OLD}, and using an incompatible set of commitments to justify a given law LAW_{NEW}. This may be evidence of strategic behavior by the legislature, i.e., the legislature is masking contingent characteristics with purported fundamental commitments, or it may simply be evidence of legislative negligence, carelessness, or imprecision. Again, the court has two options: it may either modify or invalidate LAW and any inconsistent legislative commitments used to justify it, or it may modify or invalidate any inconsistent legislative commitments in ΣJUST and the laws that can only be justified in terms of those commitments.

Depending on whether a legislature has made its justifications explicit by endorsing them (and hence including them in ΣJUST) or not, the court will have less or more discretion in imputing intent to the legislature.[371] To the extent justifications have been made explicit, the original intent of the legislature is clear: the court will have the option of modifying or invalidating laws only to the extent that incompatibilities arise between a law *as it has been justified by the legislature* and the other laws and justifications endorsed by the legislature. If justifications have not been made explicit, the original intent of the legislature is potentially unclear, and the court is at greater liberty to reinterpret the law in light of the other laws and justifications that make up ΣLAW and ΣJUST.[372] By making justifications explicit, the legislature makes it more difficult for the court to disregard the original intent of the legislature; the trade-off is that more targets are provided for the court to invalidate or modify the law due to the admissibility of its justifications or the inconsistency of its justifications with ΣLAW or ΣJUST. By not making justifications explicit, the legislature makes it easier for the court to disregard the original intent of the legislature and to employ some other theory of

[371] Plug 2005 considers the difficulties for a court in using the intentions of legislatures and legislators to justify its interpretations of the law; making justifications explicit facilitates this process somewhat.
[372] Say, along the lines of Dworkin 1986's law as integrity.

legislative interpretation; the trade-off is that fewer targets are provided for the court to invalidate or modify the law.

The final two constitutional or meta-constitutional rules for the judicial review of laws under law as pluralism concern the termination conditions of recursive pluralism. First, the rule on justification of unenforceability:

> The legislature must justify a vote taken where an emerging law is deemed unenforceable as a practical matter.

Here, the court must determine whether the legislature has applied the appropriate criteria of enforceability. While these criteria are substantive, they do not amount to a substantive appraisal of the *content* of the law: they concern merely whether the law is enforceable in light of the practical circumstances under which the law is to be enforced, in particular the institutions involved in enforcement and the distribution of popular commitments relevant to the law. A law with a given content might be enforceable under some circumstances and not enforceable under others: it depends on the particular constellation of institutions and the distribution of popular commitments in the legislative jurisdiction in question. Through its jurisprudence, the court can develop a set of general criteria of enforceability that are applicable to any law, without passing judgment on the law's content per se. These criteria would make reference to the structure of institutions involved in enforcement and their relationships with each other, and to the distribution of popular commitments and the impact of that distribution on enforceability of the law in question.

If the court finds that a legislature L has applied the criteria of enforceability inappropriately, it may invalidate the law that was endorsed by L's vote, and call upon the legislatures below L to further specify the law.

Judicial review under the rule on justification of the legislative structure is analogous:

> The legislature must justify why the existing legislative structure should be maintained on grounds of practical enforceability, notwithstanding the fact that no lower-level legislatures are available to further specify a law.

Here again, the court must determine whether the legislature has applied the appropriate criteria of enforceability, this time in relation to a potential *expansion* or *reorganization* of the legislative structure. Since it is generally more difficult to expand or reorganize the legislative structure than to adopt a law, the rule on justification of the legislative structure will likely give the legislatures more leeway than they enjoy under the rule on the justification of unenforceability. But the same general principles apply: the criteria for judging whether a legislative structure should be maintained in light of its inability to reach tight consensus on a given law do not amount to a substantive appraisal of the content of the law as such (which, if this termination condition is reached, has not yet been fully specified anyway), but rather concern whether an expanded or reorganized legislative structure might be better able to reach tight consensus in such cases, given practical

circumstances such as the distribution of popular commitments within the population, and whether such an expansion or reorganization would be practicable. In particular, the criterion of practicability would have to consider whether an expanded or reorganized legislative structure would be able to enforce laws more or less effectively that the current legislative structure.

If the court finds that a legislature L has applied the criteria of enforceability inappropriately, it may invalidate the law that was endorsed by L's vote, and call upon the top-level legislature to initiate the function `get_LS`, i.e., to begin consideration of an expansion or reorganization of the legislative structure.

This concludes the consideration of the three rules on justification applicable to legislatures and the rule on integrity as constitutional or meta-constitutional rules. Briefly put, judicial review of laws under law as pluralism involves checking whether the legislatures have justified their commitments properly. While rules of legislative procedure task the legislatures themselves with proper justification of their commitments, constitutional rules and meta-constitutional rules provide an external check on legislatures in this regard.

The following section returns to the first ground rule of this paper: the consideration so far has been limited to what *legislatures* and *legislators* do when they engaging in lawmaking. But what of the role of the public sphere beyond the legislature in the development of laws?

7.4 The public sphere as generator of popular commitments

As laid down in the first and second ground rules in subsections 1.4.1 and 1.4.2, this paper has focused on the negotiation of laws by more or less representative *legislatures*; it has not considered the role of the public sphere or of the relationship between law as pluralism and democracy, liberalism, or other political conceptions. Now that law as pluralism has been defined, however, the question arises what the link between law as pluralism and the public sphere in general might be.

The answer is indicated by the parameter passed to the function `law_as_pluralism`: ΣPOP^{P}. In order for law as pluralism to function, it must know what the popular commitments in the population P are. Only once these popular commitments are available can law as pluralism determine which of these commitments should be admitted as input commitments to the legislative process.

The set of popular commitments is not supplied to the legislature out of thin air: rather, relevant commitments are proposed for inclusion as input commitments by the *legislators*. Which popular commitments are proposed for inclusion is a matter of the skill of legislators in assessing the prospects of the negotiation. But given that the legislature under law as pluralism is stipulated to be *representative* of the population it binds, the popular commitments are not *generated* by the legislators themselves; rather, they are generated by the population, i.e., by the public sphere.

How popular commitments are generated by the public sphere is irrelevant to law as pluralism, as long as the popular commitments made available to the legislature (in each legislative jurisdiction) are representative of the subset of the population in question. If certain popular commitments are screened out before they reach the legislature, law as pluralism cannot function as specified. Communitarian and civic republican theories of ascertaining the commitments of a population are one possibility for ensuring that the set of popular commitments made available to the legislature is complete: lively public participation in political issues may be conducive to this goal.[373] Other alternatives might include statistically sound surveys of popular commitments[374] or the "virtual representation"[375] of popular commitments in the legislature.

Regardless of the method actually chosen in a given population, the criterion for evaluating its success is simply whether the set of popular commitments made available to the legislative process is complete. If a society is unable to convey the full set of popular commitments to the legislature, law as pluralism fails.

Since law as pluralism stipulates that the legislative process is not about *modifying* fundamental commitments, but rather only about negotiating and adopting laws that bind a population with conflicting fundamental commitments,[376] it is likewise important that the public sphere be able to play the role of modifying popular commitments where necessary. A freewheeling Millian "marketplace of ideas" is one option,[377] as are various conceptions of public political discourse guided by public justification,[378] or the unrestricted exercise of religious or philosophical education, discourse, and practice. It is irrelevant to law as pluralism whether popular commitments are shaped through rationale persuasion, narratives, peer pressure, or indoctrination – as long as none of the commitments held by a population are prevented from entering the legislative process.

This means that while legislatures under law as pluralism employ a technical sense of "justification" as employed in the chapters above, especially chapter 4 on "The justificatory constraint of law as pluralism" and chapter 5 on "Decomposing and synthesizing commitments," the public sphere can get by with a much looser species of "reasons." Appiah gives the example of a group of people discussing an Afghan film, in order to evaluate whether toppling the Taliban was the right thing to do:

> You could insist on a technical use of the word "reason" to mean something like "calculation," which is what it seems to mean when modern Positivists use it. And then it would be fine to say that when people talk in these ways [i.e., discussing the Afghan film] they are not, strictly speaking, reasoning

[373] A tradition going back at least to Rousseau 1762 and advocated most fervently nowadays by deliberative democrats.
[374] E.g., the "deliberative polling" of James Fishkin; see Fishkin 2009 and Fishkin, He, Luskin, and Siu 2010.
[375] A previously frowned-up concept revived by Ely 1980, 82-87.
[376] See the discussion on p. 70 and in n. 171 above.
[377] See Mill 1859.
[378] See subsections 4.3 and 4.4 on public justification above.

> together. But in the English we speak every day, it is natural to call what we do when we seek, through a conversation rich in the language of value, to shape each other's thoughts and sentiments and deeds, "offering reasons."[379]

In the public sphere, the game of "giving and asking for reasons" is played on a much larger field than in legislatures. While at least some of what legislators do under law as pluralism comes close to the positivistic "calculation" Appiah refers to, this type of reasoning is inappropriately restrictive for the public sphere. Only once the public sphere has had the opportunity to generate reasons in the loose sense, can these reasons be considered for admission to the legislative process as justifications in the technical sense.

The rules by which the public sphere may engage in its task of generating popular commitments for the legislative process will ultimately depend on the norms established by the legislative process itself: laws will determine what kinds of persuasion, discourse, indoctrination, education, etc., are permissible and what kinds are impermissible. But these laws will themselves be generated by law of pluralism and hence guided by the commitment to pluralism and the regulative ideal of law as pluralism: any law that would prevent a popular commitment from reaching the legislative process (at least as a candidate for a proposed input commitment) would be incompatible with the commitment to pluralism and hence with law as pluralism.

There is therefore a partial separation between the legislative process and discourse in the public sphere: this separation is defined by the different *procedures* that are used to engage in discourse and the *rules* constraining those procedures. The rules constraining legislative discourse are defined by law as pluralism; the rules constraining popular discourse are defined (at least in part) by the legislative process under law as pluralism. But the separation is only partial, since the two spheres are linked by the set of popular commitments.

Because of the multi-level nature of law as pluralism, the public sphere will also be structured into multiple levels: each legislature is fed popular commitments by the public sphere in that legislature's jurisdiction. The multi-level structure of the public sphere will thus mirror the legislative structure. But it will also be as porous as the legislative structure, given the constant flow of commitments from one legislative jurisdiction to the other. And it will also be as variable as the legislative structure, given the possibility of expanding and modifying the legislature structure – especially as popular commitments change. The relationship between the public sphere and the legislative process is thus intimate, but each is governed by its own rules and plays its own role in the development of law.

This relationship between the public sphere and the legislative process under law as pluralism also puts a clearer perspective on the role played by the qualifying motives set out in 2.3.2: since the commitment to pluralism is embodied in the legislative process itself, discourse in the public sphere need not be governed by that commitment. As a corollary, the four qualifying motives (the missionary motive, the motive from fear, the precommitment motive, and the defense of pluralism motive), like any other popular

[379] Appiah 2006, 30.

commitments, may be voiced freely in the public sphere (to the extent permitted under the laws outputted by the legislative process). *Within* the legislative process, however, the missionary motive will be the toughest to express as an admissible justification, in light of the justificatory constraint of law as pluralism: since the missionary motive is strongest where someone else's *prescriptive fundamental commitments* are at issue (for instance, when I claim that the way someone else believes they ought to behave is a way I believe they *ought not to* behave), any prescriptive commitments voiced in terms of the missionary motive that conflict with those other fundamental commitments would be deemed inadmissible as a justification once they reach the doorstep of the legislative chamber. But note that those other, conflicting prescriptive fundamental commitments would likewise be inadmissible *within the legislative process*: this goes some way toward implementing the motive from fear and the defense-of-pluralism motive as an integral part of the commitment to pluralism embodied in the legislative process under law as pluralism. Finally, the precommitment motive *on its own terms*, i.e., not in conjunction with the missionary motive, will easily slip past the gatekeeper of the justificatory constraint of law as pluralism, as long as everyone (in a given legislative jurisdiction) agrees that the precommitment is worthwhile. So while there is no (prima facie) restriction on expressing the qualifying motives as justifications in the public sphere in general, the justificatory constraint of law as pluralism requires that those qualifying motives be abandoned or translated within the legislative process to the extent they are prescriptive and controversial.

7.5 International law as pluralism

Recall that the normative goal of this paper had a utopian formulation and a less ambitious formulation. The less ambitious formulation was:

> to define rules for the negotiation and adoption of laws so that, in each legislative jurisdiction, the laws are adequate to the potentially conflicting fundamental commitments of the members of the population in that legislative jurisdiction.

The utopian formulation of the goal would have been:

> to define rules for the negotiation and adoption of laws so that the laws are adequate to the potentially conflicting fundamental commitments of the members of *the entire world's population*.

The discussion in this paper has focused on the less ambitious goal, but as remarked at the outset in section 1.2, the utopian goal is nothing but a special case of the less ambitious goal: the population P under consideration is simply the population of the whole world. So what we have said about the legislative process and the role of the public sphere with respect to a given population P also applies where P covers the entire planet. What implications does this have for the relationship between international law and law as pluralism?

The international law relevant to this discussion is international law that is potentially applicable to the population of the entire planet or a significant subset thereof; bilateral treaties between states governing particularistic matters are of little interest here. International law as a species of international *relations* is not very interesting for purposes of law as pluralism: at issue are not the arrangements between states as such, but rather the international law negotiated at the international level that serves as a guide for *human* conduct, not (merely) *state* conduct.

Negotiated international law in this restricted sense is thus equivalent to the *output commitments* generated by the top-most legislature under law as pluralism, ΣOUT^P, where P is the entire world population. As formally defined, law as pluralism has only *one* root node: hence the legislature L^P must be the legislature that negotiates and adopts ΣOUT^P, i.e., international law.

What would this legislature L^P be? Historically, it had has been close to non-existent: there has been no single world legislative body that generates output commitments applicable to the entire global population.[380] A shift occurred in 1945 with the adoption of the UN Charter,[381] but even then, L^P remains ill-defined. There are, however, intermittent hints of L^P in the United Nations Security Council, especially acting under Chapter VII of the *Charter of the United Nations*; this is currently in fact the only instance of a quasi-legislative global body issuing binding "laws" (i.e., resolutions) that are enforceable at the global level.[382] Other bodies, such as the International Court of Justice acting in contentious cases, the dispute settlement mechanisms of the World Trade Organization, or the various international criminal tribunals – especially the International Criminal Court, which in theory has jurisdiction over every individual on Earth[383] – also issue binding norms that guide human action. These latter bodies are quasi-*judicial* institutions, however; the equivalent of L^P would have to be sought in the quasi-legislative bodies that established these institutions – such as the United Nations General Assembly, diplomatic conferences, the WTO Ministerial Conference, and so on. Taken together, the quasi-legislative bodies with global jurisdiction that negotiate and adopt norms that serve as a guide for human conduct can be considered an imperfect implementation of L^P.

The fact that the norms issued by these bodies are not (always) enforceable *at the global level* is irrelevant to law as pluralism, as is the fact that they often need to be further specified at lower legislative levels (e.g., by incorporation and implementation into domestic law): law as pluralism operates under the assumption that some high-level output commitments will enjoy only loose

[380] Kant 1796/2007 may have been a tentative attempt to outline L^P, but most of Kant's prescriptions focused on the relations between *peoples*, not *people* – although his advocacy of a republican constitution and hospitality toward foreigners may be considered a first step in that direction.
[381] The League of Nations may have been a valiant experiment, but it was too dysfunctional to qualify as L^P.
[382] An example might be *United Nations Security Council Resolution 1373 (2001)*, adopted in the wake of September 11, 2001; see especially articles 1 and 2.
[383] At least in situations referred by the Security Council acting under Chapter VII of the *Charter of the United Nations*; see article 13(b) and article 87(7) of the *Rome Statute of the International Criminal Court*.

consensus at those levels, and that they must be further specified at lower levels. In this sense, (potentially) global international treaties, such as human rights instruments, adopted e.g. by the United Nations General Assembly can thus be considered top-level output commitments under law as pluralism: while they enjoy only loose consensus and are not directly enforceable, they can be further specified by legislation at the national level, thus making them enforceable.

The most glaring defect of the current system for negotiating and adopting output commitments at the global level, however, is not whether the commitments generated at that level are enforceable at that level; it is whether the output commitments are ever *adequate* to the popular commitments of the entire world population. As discussed in the previous section, the role of the public sphere for the purposes of law as pluralism is to generate popular commitments that can serve as potential input commitments to the legislative process: at the international level, this would mean that the availability of *all* popular commitments to the international legislative process must be ensured – which is not yet the case. In addition to a clearer definition of L^P at the global level (whether or not commitments outputted by L^P are in fact enforceable in the legislative jurisdiction that covers the entire planet), *international law as pluralism* would have to implement mechanisms to ensure the availability of all global popular commitments to the legislative process in L^P, so that the output commitments adopted by L^P might be adequate to those popular commitments.

The negotiation and adoption of laws at the global level is simply a special case where L^P binds the entire world population. Where this special case applies, *all* (multi-level) laws adopted worldwide (to the extent they reflect conflicting fundamental commitments) are a species of international law: the top-most output commitments expressed by any law are generated by the top-most legislature L^P, while lower-level output commitments are generated by lower-level (say, national) legislatures. A hint of this already can be seen inter alia in the domain of international human rights, humanitarian, and criminal law, certain aspects of international trade and diplomatic law, law of war, law of the sea and outer space, and international environmental law: national prohibitions against genocide, for instance, are generally nothing other than a further specification of the output commitments expressed in the Genocide Convention,[384] and even national and sub-national provisions governing food and product safety, for instance, often implement norms that have been negotiated and adopted at the international level. Under law as pluralism, the relevant *laws* are multi-level, rooted in the global legislature L^P (whatever L^P may be for the relevant subject matter) and extending downward through multinational (e.g., European Union), national, and sub-national legislative levels; the relevant *output commitments*, in contrast, are generated separately at each of these levels.

[384] See *Convention on the Prevention and Punishment of the Crime of Genocide*, especially articles II and III.

7.6 Law as pluralism as a critical tool

The previous section on "International law as pluralism" indicates how law as pluralism can serve as a *critical tool*: it is not merely a theoretical construct bearing no relation to (current) reality; it is a tool that can be used to critique the adequacy of real-world legislation and the appropriateness of real-world legislative structures and processes.

Legislative systems, including their structures and processes, are seldom created *ex nihilo*:[385] as formally defined in this paper, law as pluralism could perhaps only be implemented on Pluto. But our Plutonian diplomat's task at the outset of this project was not to recreate the Plutonian legislative system on Earth; it was to *nudge* Earthlings in the direction of law as pluralism. For this purpose, the formal definition of law as pluralism can be used as a tool to critique existing legislative systems and suggest possible improvements.

7.6.1 Examples of uses as a critical tool

First and foremost, the critique leveled at international law in the previous section applies to *all* legislative jurisdictions, regardless of their extension: law as pluralism requires that *any* legislature L with the power to bind a population or subset of a population in its legislative jurisdiction must, to the extent achievable, take account of *all* popular commitments held in that legislative jurisdiction. Because of the justificatory constraint of law as pluralism, not all of the popular commitments will actually be admitted to the legislative process as input commitments: but they must be available as candidates for such admission. This has consequences both for the role of the public sphere, as discussed in section 7.4 above, and for the composition of the legislature: the public sphere must be able to generate popular commitments freely and make them available to the legislature, and the legislature must be representative enough (in accordance with the second ground rule set out in subsection 1.4.2) to give these popular commitments sufficient consideration. A legislature that is too small for a given population or subset thereof may not be representative enough to ensure the adequacy of its output commitments – especially if the legislatures below that legislature are likewise not fine-grained enough to make up for the deficit. Conversely, a legislature that is too large may be unable to reach loose consensus or tight consensus – and hence generate enforceable laws – even just on practical grounds: the inefficiencies of negotiation might make the legislative process unmanageable. The first two potential uses of law as pluralism as a critical tool are accordingly the following:

1. A legislature can serve its role properly only if the public sphere is able to make *all* popular commitments available to that legislature for consideration as input commitments.

[385] Even "revolutionary" constitutions such as the U.S. Constitution of 1787/89, the French Constitutions of 1791-1799, the German and Japanese Constitutions after the Second World War, the post-colonial constitutions of the 1960s and 1970s, the post-Soviet constitutions after 1989, and the South African Constitution of 1996 built on existing formal and informal legislative structures and processes, even when the old structures and processes were formally abolished.

2. A legislature may be too small and/or insufficiently representative to ensure the adequacy of legislation; or it may be too large and hence too unwieldy to ensure the enforceability of legislation.

For instance, a public sphere that prohibits public expression of Holocaust denial might be critiqued with reference to (1);[386] a legislature whose first-past-the-post election system excludes representation of marginalized minorities might be critiqued with reference to (2).[387]

Once all popular commitments are made available and the legislative process is underway in a sufficiently representative and workable legislature, the four rules on justification and the rule on integrity can serve as critical tools, even where they are not formally enshrined as rules of legislative procedure or constitutional or meta-constitutional rules.

First, the rule on justification of proposals: whereas offering controversial prescriptive commitments as justifications for legislative proposals in the *public sphere* is compatible with law as pluralism, offering them as justifications *within the legislative process* is not. When legislators are working *as legislators* (and not, say, as campaigners or public advocates), the justifications they offer should either be descriptive or uncontroversial (or both). The separation between the legislative persona and the public persona of a legislator is not always straightforward: a legislator may make a public pronouncement on a legislative proposal in order to secure a better negotiating position within the legislature, or a justification may be advanced in legislative negotiations with the intention to secure votes in the next elections. What law as pluralism requires is that when legislators justify their support of or opposition to proposals *on the legislative record*, in *public or non-public legislative deliberations*, or when *subject to the rules of legislative procedure*, they honor the justificatory constraint of law as pluralism. This desired separation between the legislative persona of a legislator and the public persona of a legislator is not dissimilar to that of a judge, prosecutor, or lawyer in and out of court: some statements and justifications may be appropriate outside the courtroom, while the same statements and justifications are inappropriate inside the courtroom (or even the jury room or judge's chambers). In light of the rule on justification of proposals, law as pluralism may thus be used as a critical tool in the following way:

3. When engaged in legislative negotiations, a legislator should refrain from making justifications in terms of controversial prescriptive

[386] Though not necessarily conclusively: a descriptive commitment such as "public expressions of Holocaust denial lead to civic unrest" would be admissible as an input commitment and might have a determinative impact on the relevant laws adopted.

[387] These two potential critiques are not uniquely available to law as pluralism; they are also commonly used by advocates of political liberalism. They may even be used by monarchists and direct democrats distrustful of the role of legislatures; see, e.g., Hans-Adam 2009, 96: "It is difficult to say what the optimum size of a parliament should be. It probably differs from one case to another. Whenever there is doubt, a smaller number is better. The parliament of Liechtenstein had for a long time only fifteen members and a few deputy members, none of them full-time. Compared to much larger parliaments, the small Liechtenstein parliament did a good job." What is unique about these critiques with respect to law as pluralism is that they refer to the ability of popular commitments to serve as input commitments, and the adequacy of output commitments to those input commitments.

commitments; other legislators and the public should hold the legislator to this.

For instance, a legislator justifying a ban on the construction of minarets in terms of the controversial prescriptive commitment "the public space should be free from non-Christian religious symbols" could be critiqued with reference to (3); a legislator justifying the same ban in terms of the descriptive commitment "minarets are a sign of the political aspirations of Islam" could not.[388]

The rule on justification of laws expands this principle from the individual legislator to the legislature as a whole: providing justifications for a given law makes the law appear less arbitrary; unjustified laws may in fact be unjustifiable. The legislative justification of laws provides a guide for interpretation, both to the executive and judicial branches, but also to the public. Justification may be particularly important where fundamental commitments are at stake: if a law is in danger of conflicting with the fundamental commitments of members of the population it binds, the perceived need for justification may be even greater than where "mere" contingent characteristics are at stake. Used as a critical tool, law as pluralism says that where such justifications are in fact provided, they should not be in terms of controversial prescriptive commitments. Justifying a law in terms of controversial prescriptive commitments implies that incompatible commitments held by members of the population are to be excluded *in principle*, not in light of the practical need to find laws that are workable for an entire (subset of a) population with diverse and conflicting commitments. By limiting the justification of laws to descriptive commitments and uncontroversial prescriptive commitments, and the intermediate commitments that can be derived therefrom, the legislature helps ensure that debates *about* controversial prescriptive commitments remain outside the legislature, where they belong. This leads to the following use of law as pluralism as a critical tool:

4. Where fundamental commitments are at stake, a legislature should justify the laws it adopts. Where such justifications are offered, the legislature should refrain from making them in terms of controversial prescriptive commitments; the other branches of government, other legislatures, and the public should hold the legislature to this.

For instance, a legislature justifying a reduction of daycare subsidies in terms of the controversial prescriptive commitment "mothers should be encouraged to stay at home" could be critiqued with reference to (4); a legislature justifying the same reduction in terms of the descriptive commitment "daycare subsidies provide an incentive for mothers to work full-time" could not.

Closely related to this is the rule on integrity: if the purpose of legislation is to provide a guide for human conduct, especially where fundamental

[388] As an exercise, one might skim through the arguments made by the Swiss People's Party in favor of a ban on minarets and consider whether they would be admissible in the legislative process under law as pluralism – and at what legislative level. See http://www.svp.ch/g3.cms/s_page/78670/s_name/auslaenderpolitik.

commitments are at stake, the body of legislation applicable to any given member of the population should be consistent. No one should be put in a position where the laws applicable to that person pull him in two different directions at the same time,[389] especially where conflicts with fundamental commitments arise. This consistency is called for within the body of law adopted by a given legislature, but also in regard to the laws adopted *across* legislatures, to the extent they concern one and the same person. New laws applicable to a given person should either fit into the body of law applicable to that person, or they should be accompanied by the amendment or repeal of existing, incompatible laws:

5. Where fundamental commitments are at stake, a legislature should only adopt laws that are consistent with those already in force – regardless of the legislature that adopted them – if the new laws affect the same persons as the laws already in force; or else the existing, incompatible laws should be amended or repealed accordingly. The other branches of government, other legislatures, and the public should hold the legislature to this.

For instance, a California law decriminalizing the possession of marijuana against the backdrop of a federal law criminalizing the possession of marijuana could be critiqued with reference to (5);[390] while a California law reducing the penalty for possession of marijuana to an infraction could not.[391]

The last two rules on justification – the rule on justification of unenforceability and the rule on justification of the legislative structure – both aim at justifying deviations from tight consensus: the default requirement under law as pluralism is that every law affecting fundamental commitments should enjoy tight consensus, i.e., it must be adequate to the fundamental commitments of the members of the population it binds, to the extent those fundamental commitments have been admitted as input commitments to the legislative process, and it must be enforceable. Adequacy trumps enforceability at a given level if lower-level legislatures are available that can ensure enforceability; in that case, it suffices for the legislature at a given level to ensure loose consensus. The rule on justification of unenforceability requires a legislature to justify why laws that would enjoy tight consensus *across multiple existing levels* are unenforceable, and hence a vote must be taken to settle the issue; the rule on justification of the legislature structure requires a legislature to justify why the legislative structure *should not be expanded or modified* in order to achieve tight consensus, and hence a vote must be taken to settle the issue. Even where tight consensus is a mere aspiration, not a default requirement, the principles underlying these rules can be used to critique the adoption of laws by way of a vote:

6. Where fundamental commitments are at stake, a legislature should adopt a law by way of a vote instead of limiting itself to the areas in which loose consensus can be achieved and delegating the remaining issues to lower-level legislatures *only if* the resulting law would be unenforceable as a practical matter. The legislature must justify such a

[389] Thus turning him into Buridan's ass.
[390] California Proposition 19 (2010); see *Regulate, Control and Tax Cannabis Act of 2010*.
[391] California Senate Bill 1449, which entered into force on 1 January 2011; see *Senate Bill 1449*.

vote in terms of enforceability. The other branches of government, other legislatures, and the public should hold the legislature to this.

7. Where fundamental commitments are at stake and tight consensus cannot be achieved given the existing legislative structure, a legislature should adopt a law by way of a vote instead of proposing a modification or expansion of the legislative structure *only if* the modification or expansion of the legislative structure would lead to unenforceable legislation as a practical matter. The other branches of government, other legislatures, and the public should hold the legislature to this.

If, for instance, the U.S. Congress votes to limit marriage to heterosexual, monogamous couples, while state legislatures would happily extend marriage to include homosexual couples, and no enforceability problems arise, that vote by the U.S. Congress might be critiqued with reference to (6);[392] a vote by the U.S. Congress setting out uniform rules for the distribution of Social Security benefits to married couples might not. Similarly, a vote by the majority-Muslim Sudanese legislature to suspend a referendum on self-government in majority-Christian South Sudan might be critiqued with reference to (7); while a vote by the United Nations Security Council refusing to admit Facebook as an independent member state might not.

7.6.2 Adequacy as a measure of the pluralism of legislation

The use of these critical tools helps nudge existing legislative systems, regardless of their level and the members of the world population they bind, toward the ideal of law as pluralism, even where law as pluralism cannot be implemented *ex nihilo*. The adequacy of legislation to conflicting fundamental commitments provides a *measure of the pluralism* of the legislation – a measure that can be used to critique the "goodness" of the legislation in terms of the normative conception of pluralism, alongside other measures one may choose to apply under other, complementary political conceptions.

Using law as pluralism as a critical tool, mechanisms can be defined and successively improved for negotiating and adopting legislation *at all levels* that is adequate to the plurality of conflicting beliefs, values, and other fundamental commitments held by the members of the population bound by that legislation. The task of the Plutonian diplomat is done; it is up to Earthlings to put law as pluralism into practice, to the extent achievable.

[392] See, e.g., *Defense of Marriage Act of 1996*. This critique is not uniquely available to law as pluralism; it is also often invoked by critics of federal power. See, e.g., Goodwin 1995.

8 Appendix

This Appendix includes the entire algorithm (in pseudocode) implementing law as pluralism. Functions assumed to be primitive are specially marked: these functions are executed directly by the legislature in question and are either straightforward (marked in blue), or they are where the hard (and potentially non-algorithmic) work of legislative negotiation takes place (marked in red). These hard functions, the outcome of which is determined by the skill of the legislators, are the following: `get_LS`, `negotiate`, `vote`, and `is_enforceable`.

```
//The global variable ΣLAW is the set of all laws currently in force
//and is available to all the functions.

global ΣLAW = {}


//The function law_as_pluralism is the top-level function which
//makes the initial call to the recursive function legislate. It
//takes the set of popular commitments of the entire population as a
//parameter and returns no output. It runs in a potentially infinite
//loop, continuously updating ΣLAW by adding newly generated
//laws and purging it of obsolete laws. The function law_as_pluralism
//also provides the opportunity for the legislative structure itself
//to be updated, given the continuously changing set of popular
//commitments.

law_as_pluralism (ΣPOP^P) {

    LS^P = ∅

    while humanity_exists {

       LS^P = get_LS (LS^P, ΣPOP^P)

       LAW = legislate (LS^P, ΣPOP^P, {})

       ΣLAW = purge_ΣLAW (LAW, ΣLAW)

       ΣLAW = ΣLAW ∪ LAW

    }
}


//The function get_LS modifies the legislative structure in light of
//changing popular commitments. It takes the current legislative
//structure and the current set of popular commitments as its
//parameters. It returns the modified legislative structure.
//The function get_LS is only partially algorithmic: it requires
//higher lawmaking work to define the new legislature structure.

get_LS (LS^P, ΣPOP^P) {

    LS^P' = ∅
```

```
    //this is where higher lawmaking takes place and LS^P' is defined

    return LS^P'
}


//The recursive function legislate is the heart of law as pluralism.
//Given a set of popular commitments at a given level, it generates
//the relevant set of output commitments as its contribution
//to the emerging law. When called at the top-most
//legislative level, it generates the law itself. The
//recursive function takes the legislative structure rooted at the
//current legislature, the set of popular commitments held by the
//relevant subset of the population, and the output commitments
//generated so far by legislatures in a direct line above the current
//legislature as its parameters. It returns a law or a
//contribution to a law.
//The recursive function first generates the set of admissible input
//commitments from the set of popular commitments. It then calls the
//function negotiate, which generates proposed output commitments (in
//the form of intermediate commitments), given the set of input
//commitments. It calls get_ΣOUT' to weed out the intermediate
//commitments that are incompatible with the input commitments, thus
//generating an adequate set of output commitments.
//If the set of output commitments generated so far enjoys only loose
//consensus, the recursive function calls itself and invokes the
//next-lower legislatures with the appropriate parameters, if such
//legislatures exist. If no such legislatures exist, the current
//legislature takes a vote to decide on its contribution to the
//law.
//If, on the other hand, the set of output commitments enjoys tight
//consensus, the legislature checks whether the preliminary
//law is enforceable as a practical matter. If it is,
//the relevant contribution to the law is returned to
//the calling function. If not, a vote is taken, and the result of
//that vote is returned to the calling function as the current
//legislature's contribution to the law.

legislate (LS, ΣPOP, ΣOUT) {

    LAW = {}

    ΣINP = get_ΣINP (ΣPOP)
    ΣINT = negotiate (ΣINP)
    ΣOUT' = get_ΣOUT' (ΣINT, ΣINP)

    if (not is_tight (ΣOUT ∪ ΣOUT')) {

        if (∃ child node of LS) for all LS' = child node of LS {

            LAW=LAW ∪ legislate(LS',get_ΣPOP'(LS',ΣPOP),ΣOUT ∪ ΣOUT')

        } else ΣOUT' = vote (ΣINT)

    }

    if (is_enforceable ({⟨LS, ΣOUT ∪ ΣOUT'⟩} ∪ LAW)) {

        return {⟨LS, ΣOUT'⟩} ∪ LAW

    } else {
```

```
        return {⟨LS, vote (ΣINT)⟩}

    }
}


//The function get_ΣINP generates the admissible input commitments,
//given the relevant set of popular commitments. It takes that set
//of popular commitments as its parameter and returns the generated
//set of input commitments. For each popular commitment, it checks
//whether the commitment is descriptive or uncontroversial, in which
//case the commitment is admissible as an input commitment;
//otherwise it is not.

get_ΣINP (ΣPOP) {

    ΣINP = {}

      for all POP ∈ ΣPOP {

        if ((not is_prescriptive (POP)) or
            is_uncontroversial (POP, ΣPOP))

            ΣINP = ΣINP + POP

    }

    return ΣINP
}


//The function is_prescriptive has the legislature check whether a
//given popular commitment is prescriptive or not. It takes a popular
//commitment as its parameter; it returns TRUE if the commitment is
//prescriptive and FALSE if it is not.

is_prescriptive (POP) {

    //this is where the legislature decides whether POP is
    //prescriptive

    return TRUE or return FALSE
}


//The function is_uncontroversial checks whether a given popular
//commitment is compatible with each of the other prescriptive
//popular commitments and hence uncontroversial. It takes a
//(prescriptive) popular commitment and the set of popular
//commitments as its parameters; if the popular commitment is
//uncontroversial, the function returns TRUE; otherwise it
//returns FALSE.

is_uncontroversial (POP, ΣPOP) {

    for all POP' ∈ ΣPOP {

      if (is_prescriptive (POP') and (POP / POP')) return FALSE
```

```
    }

    return TRUE
}


//The function negotiate has the legislature negotiate and generate
//proposed output commitments in the form of intermediate
//commitments. It takes the set of input commitments as its parameter
//and returns the set of proposed output commitments.
//The function is non-algorithmic: the legislature must do the hard,
//skillful work of negotiating in accordance with the principles of
//law as pluralism, in particular the justificatory constraint of
//law as pluralism and the synthesis of intermediate commitments.

negotiate (ΣINP) {

    //this is where the real meat of the negotiation happens

    return ΣINT
}


//The function get_ΣOUT' generates a set of adequate and endorsable
//output commitments, given a set of proposed output commitments.
//The function takes the set of proposed output commitments, in the
//form of intermediate commitments, and the set of admissible input
//commitments as its parameters. It returns the set of adequate and
//endorsable output commitments. For each proposed output commitment,
//the function checks whether the commitment is adequate to the set
//of input commitments. If so, the proposed output commitment is
//included as an endorsable output commitment; if not, it is
//discarded.

get_ΣOUT' (ΣINT, ΣINP) {

    ΣOUT' = {}

    for all INT ∈ ΣINT {

        if (is_adequate (INT, ΣINP)) ΣOUT' = ΣOUT' + INT

    }

    return ΣOUT'
}


//The function is_adequate checks whether a proposed output
//commitment, in the form of an intermediate commitment, is adequate
//to the set of input commitments. It takes an intermediate
//commitment and the set of input commitments as its parameters. If
//the intermediate commitment is compatible with each of the input
//commitments, the function returns TRUE; otherwise it returns FALSE.

is_adequate (INT, ΣINP) {

    for all INP ∈ ΣINP {
```

```
      if (INT / INP) return FALSE

    }

    return TRUE
}


//The function is_tight has the legislature check whether a set of
//output commitments enjoys tight consensus or not. It takes the
//set of output commitments as its parameter. If the set of output
//commitments enjoys tight consensus, the function returns TRUE;
//otherwise it returns FALSE.
//The function is non-algorithmic: it is up to the legislature to
//assess whether a set of output commitments enjoys tight consensus;
//in general, this is a straightforward task.

is_tight (ΣOUT') {

    //this is where the legislature decides whether a set of output
    //commitments enjoys tight consensus or not

    return TRUE or return FALSE
}


//The function get_ΣPOP' generates the set of popular commitments
//held by the subset of the population subject to a given
//legislature. It takes that legislature as its first parameter;
//as its second parameter, it takes the popular commitments held
//by the population subject to the legislature making the function
//call (i.e., the population of which the desired population is a
//subset). It returns the set of popular commitments held by the
//members of the desired legislative jurisdiction.
//The function is executed by the legislature, but is straightforward
//given the set of popular commitments made available to it by the
//function.

get_ΣPOP' (LS', ΣPOP) {

    //this is where the legislature determines which popular
    //commitments are held by the subset of the population subject
    //to the legislative jurisdiction of LS'

    return ΣPOP'
}


//The function vote generates a set of endorsed output commitments
//by having the legislature take a vote. The function takes a set of
//proposed output commitments, in the form of intermediate
//commitments, as its parameter and returns the set of endorsed
//output commitments. Such a vote is taken where the recursive
//function fails to find a tight consensus, or where the preliminary
//law generated by the recursive function is deemed to be
//unenforceable as a practical matter.
//The function is non-algorithmic: the legislature uses the criterion
//of practical enforceability to decide on the output commitments
```

```
//it endorses.

vote (ΣINT) {

    //this is where the legislature endorses its output commitments
    //by voting

    return ΣOUT'
}



//The function is_enforceable has the legislature decide whether a
//preliminary law generated by the recursive function
//is enforceable or not. It takes the preliminary law
//as its parameter. If the law is deemed enforceable, the function
//returns TRUE; otherwise it returns FALSE.
//The function is non-algorithmic: the legislature uses its skill
//to assess whether a preliminary law is enforceable
//as a practical matter or not.

is_enforceable (LAW') {

    //this is where the legislature decides whether a preliminary
    //law is enforceable as a practical matter

    return TRUE or return FALSE
}



//The function purge_ΣLAW purges laws from the set of existing laws
//if they are incompatible with the newly generated law. The function
//takes the new law and the set of existing laws as its parameters,
//and it returns the purged set of laws.

purge_ΣLAW (LAW, ΣLAW) {

    ΣLAW' = ΣLAW

    for all LAW' ∈ ΣLAW' {

        if (LAW / LAW') ΣLAW' = ΣLAW' - LAW'

    }

    return ΣLAW'
}
```

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10 Curriculum vitae

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Education

April 2011	Doctor of Philosophy, Philosophy (summa cum laude), doctoral thesis on "Law as Pluralism: The Adequacy of Legislation to Conflicting Fundamental Commitments," accepted on the recommendation of Prof. Dr. Urs Marti and Prof. em. Dr. Georg Kohler (defended March 2, 2011)
Sep 2007 – April 2011	University of Zurich, Department of Philosophy, doctoral work under the supervision of Prof. Dr. Urs Marti
May 2000	Juris Doctor (magna cum laude, Order of the Coif)
Aug 1997 – May 2000	Study of Law at New York University School of Law
Aug 1999 – May 2000	Junior Fellow, Center for International Studies, under the direction of Prof. Thomas M. Franck
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	Bachelor of Arts, Public Policy (with distinction)
	Bachelor of Science, Symbolic Systems (with distinction)
Sep 1991 – June 1997	Study of Philosophy, Public Policy, and Symbolic Systems at Stanford University (Phi Beta Kappa)
Aug 1990	Maturität Typus A (Ancient Greek, Latin)
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Professional Experience

Jan 2003 – present	Owner, consultant, and translator at Huston Consulting, Glarus, Zurich and Vaduz
Aug 2001 – Dec 2002	Legal advisor, Permanent Mission of the Principality of Liechtenstein to the United Nations, New York
Aug 2000 – July 2001	Coordinator/Associate, International Justice Program, Lawyers Committee for Human Rights (Human Rights First), New York

Publications

2006 *Potential Impact of ICTY Cases on ICJ Cases against Serbia and Montenegro*, REVIEW OF INTERNATIONAL AFFAIRS, VOL. LVI-LVII, NO. 1120-1121 (2005-2006).

2000 *Implementation of the ICC Statute: International Obligations and Constitutional Considerations*, in "The Rome Statute and Domestic Legal Orders, Volume I: General Aspects and Constitutional Issues", Prof. Dr. Claus Kress and Prof. Dr. Flavia Lattanzi (eds.), Nomos (Baden-Baden) and Il Sirente (Rome), 2000, with Helen Duffy.

2000 *Ratification of the Rome Statute in the Principality of Liechtenstein: Challenges Faced by a Small State*, in "The Rome Statute and Domestic Legal Orders, Volume I: General Aspects and Constitutional Issues", Prof. Dr. Claus Kress and Prof. Dr. Flavia Lattanzi (eds.), Nomos (Baden-Baden) and Il Sirente (Rome), 2000.

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